97

(1)

FILED

No. _____ 08-31 JUL 3 - 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

In The Supreme Court of the United States

NUFARM AMERICA'S INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Joel R. Junker
Counsel of Record
JOEL R. JUNKER & ASSOCIATES
1191 Second Avenue, Suite 1800
Seattle, Washington 98101
(206) 621-7878

Counsel for Petitioner

THE LEX GROUP^{DC} • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax (202) 955-0022 • www.thelexgroupdc.com

QUESTION PRESENTED

Whether the Export Clause in Article I, Section 9, Clause 5 of the United States Constitution is violated by assessment of duties on goods, pursuant to the North American Free Trade Agreement Article 303, the North American Free Trade Agreement Implementation Act and 19 C.F.R. § 181.53, because those goods have been exported to a NAFTA country after importation into a duty deferral program.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioner Nufarm America's, Inc. states that it is a wholly owned subsidiary of Nufarm Limited which is a publicly traded corporation.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

RULE 29.6 DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL, TRADE AGREEMENT, STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

1. CONSTITUTIONAL PROVISION AT ISSUE – THE EXPORT CLAUSE 2

2. TRADE AGREEMENT PROVISION, STATUTE AND REGULATION AT ISSUE 2

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE PETITION 9

1. THE FEDERAL CIRCUIT'S RESTRICTIVE APPLICATION OF THE EXPORT CLAUSE IS CONTRARY TO LONGSTANDING SUPREME COURT PRECEDENT PROHIBITING DUTIES ON GOODS IN EXPORT TRANSIT AND DUTIES ON SERVICES AND ACTIVITIES CLOSELY RELATED TO THE EXPORT PROCESS. 9

2. DISCRETIONARY REVIEW BY THIS COURT IS COMPELLED BY A) THE REQUIREMENT THAT ONLY THIS COURT CAN REVERSE ITS EARLIER PRECEDENT; B) THE COURT'S STATED INTENTION TO REEXAMINE THE ISSUE OF DUTIES ON EXPORT SERVICES AND ACTIVITIES; C) THE FACT THAT ONLY THIS COURT CAN REVIEW FEDERAL CIRCUIT PRECEDENT IN INTERNATIONAL TRADE CASES; AND D) THE GENERAL PUBLIC, COMMERCIAL AND ECONOMIC IMPORTANCE OF THE ISSUE ON APPEAL. 24

CONCLUSION 26

APPENDIX

Opinion and Judgment of
The United States Court of Appeals for
The Federal Circuit
entered April 7, 2008 ..... 1a

Opinion and Judgment of the
United States Court of International Trade
entered February 15, 2007 .....14a

U.S. CONST. Art. I, § 9, Cl. 5 .....37a

North American Free Trade Agreement
Article 303 .....38a

19 C.F.R. § 181.53 .....45a

TABLE OF AUTHORITIES

PAGE(S)

Cases

A.G. Spalding & Brothers v. Edward,
262 U.S. 66 (1923) 16, 17, 18

Cornell v. Coyne,
192 U.S. 418 (1904) 13

Fairbank v. United States,
181 U.S. 283 (1901) 10, 11, 21

Nufarm America's, Inc. v. United States,
398 F. Supp. 2d 1338 (CIT 2005) 1

Nufarm America's, Inc. v. United States,
521 F.3d 1366 ..... 1, 14, 16

Thames & Mersey Marine Ins. Co. v. United States,
237 U.S. 19 (1915) 11

United States v. Hvoslef,
237 U.S. 1 (1915) 11

United States v. International Business Machines Corp.,
517 U.S. 843 (1996) ..... 10, *passim*

United States v. U.S. Shoe Corp.,
523 U.S. 360 (1998) ..... 10, *passim*

Wm E. Peck & Co. v. Lowe,
247 U.S. 165 (1918) 12

Constitutional Provision

U.S. CONST. Art. I § 9, Cl. 5 2

Trade Agreement Provision

North American Free Trade Agreement,
Article 303 ..... 3, *passim*

Statutes

19 U.S.C. § 1514 7

19 U.S.C. § 3333 6

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1295(a)(5) 8, 25

28 U.S.C. § 1581(a) 8

Harmonized Tariff Schedule of the United States

U.S. Note 1(a) Chapter 98 Subchapter XIII 7, 15

U.S. Note 1(c), Chapter 98, Subchapter XIII 5

Public Laws

Homeland Security Act of 2002, Pub. L. 107-296, Sec. 1502, 116 Stat. 2135, 2308-2309 (2002) 8

North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) 3

Regulations

19 C.F.R. § 10.31 7

19 C.F.R. § 10.39(d)(1) 15

19 C.F.R. § 181.53 ..... 5, 7, 8, 16

19 C.F.R. § 181.53(a)(2)(i)(A) 6, 18

19 C.F.R. § 181.53(b)(1)-(5) 22

19 C.F.R. § 181.53(b)(5) 7

19 C.F.R. § 181.53(c) 18

Rule

USCIT Rule 56 8

Other Authorities

House Report 103-361(I), 19913 U.S.C.C.A.N. 2553, 2590 20

Foreign-Trade Zones Act of 1934, c. 590, 48 Stat. 998; S. Rep. No. 73-905, at 1 (1934); H.R. Rep. No. 73-1521, at 1 (1934) 22

HQ228931, August 28, 2001 16

In The
Supreme Court of the United States

NUFARM AMERICA'S, INC.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Nufarm America's, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 521 F.3d 1366 (Fed. Cir. 2008). The opinion of the United States Court of International Trade (App., *infra*, 14a-33a) is reported at 398 F. Supp. 2d 1338 (CIT 2005).

JURISDICTION

The judgment of the court of appeals (App., *infra*, 12a-13a) was entered on April 7, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, TRADE AGREEMENT, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. CONSTITUTIONAL PROVISION AT ISSUE – THE EXPORT CLAUSE

The Export Clause of the U.S. Constitution states:

> No Tax or Duty shall be laid on Articles exported from any State.

U.S. Constitution Article I, Section 9, Clause 5.

2. TRADE AGREEMENT PROVISION, STATUTE AND REGULATION AT ISSUE

Generally described, United States customs law allows an importer to import goods conditionally exempt from duty under the Harmonized Tariff Schedule of the United States so long as they are used as a material in the production of another good that is subsequently exported within one year. This import procedure is known as a type of Temporary Importation under Bond, or "TIB," and is one of several duty deferral programs under United States customs law. However, if the good manufactured in the United States is exported out of a duty deferral

program to another NAFTA country, *viz.* Canada or Mexico, the NAFTA and United States Customs regulations require the importer after export to file a customs entry, the exported good becomes "subject to duty," and the importer must pay duty "as if" the imported materials had been imported for consumption in the United States in the first place. The stated policy purpose of these legal requirements and duty payments is to place restrictions on trade to other NAFTA countries through duty deferral programs to ensure that none of the NAFTA countries become an "export platform" for materials produced in other regions of the world.

The North American Free Trade Agreement ("NAFTA"), entered into on December 17, 1992 and enacted under the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), provides in Article 303 certain restrictions on waiver or reductions of duties as a result of goods being exported out of duty deferral programs to another NAFTA country.

NAFTA Article 303 provides in pertinent part:[1]

> Restriction on Drawback and Duty Deferral Programs
>
> 1. Except as otherwise provided in this Article, no Party may refund the amount of customs duties paid, or

---

[1] NAFTA Article 303 is set forth in its entirety in the Appendix *infra*, pp. 38a-44a.

waive or reduce the amount of customs duties owed, on a good imported into its territory, on condition that the good is:

a) subsequently exported to the territory of another Party,

b) used as a material in the production of another good that is subsequently exported to the territory of another Party, or ...

3. Where a good is imported into the territory of a Party pursuant to a duty deferral program and is subsequently exported to the territory of another Party, or is used as a material in the production of another good that is subsequently exported to the territory of another Party, or is substituted by an identical or similar good used as a material in the production of another good that is subsequently exported to the territory of another Party, the Party from whose territory the good is exported:

a) shall assess the customs duties as if the exported good had been withdrawn for domestic consumption; and

> b) may waive or reduce such customs duties to the extent permitted under paragraph 1....
>
> 9. For purposes of this Article:
>
> Customs duties are the customs duties that would be applicable to a good entered for consumption in the customs territory of a Party if the good were not exported to the territory of another party.

The Customs regulation that recites and implements the requirements of Article 303 is 19 C.F.R. § 181.53 ("the Regulation") which provides in pertinent part:[2]

> *General*...Where a good is imported into the United States pursuant to a duty-deferral program and is subsequently withdrawn from the duty-deferral program for exportation to Canada or Mexico or is used as a material in the production of another good that is subsequently withdrawn from the duty-

---

[2] 19 C.F.R. § 181.53 is set forth in its entirety in the Appendix *infra*, pp. 45a-47a. Although Customs promulgated the Regulation which fully implements Article 303, it is also implemented in part at U.S. Note 1(c), Chapter 98, Subchapter XIII, Harmonized Tariff Schedule of the United States. U.S. Note 1(c), Chapter 98, Subchapter XIII reiterates in the Tariff Schedule the part of Article 303 and the Regulation respecting the reduction of duties owed on exported goods by any amounts of duty paid to the NAFTA Party into which the exports are being entered.

> deferral program for exportation to Canada or Mexico, and provided that the good is a "good subject to NAFTA drawback" within the meaning of 19 U.S.C. 3333 and is not described in § 181.45 of this part, the documentation required to be filed under this section in connection with the exportation of the good shall, for purposes of this chapter, constitute an entry or withdrawal for consumption and the exported good shall be subject to duty which shall be assessed in accordance with paragraph (b) of this section.

19 C.F.R. § 181.53(a)(2)(i)(A); App. *infra*, p. 45a.

The assessment provisions of paragraph (b) provide for TIBs:

> *Assessment and waiver or reduction of duty*...[W]here a good, regardless of origin, was imported temporarily free of duty for repair, alteration or processing (Subheading 9813.00.05, Harmonized Tariff Schedule of the United States) and is subsequently exported to Canada or Mexico, duty shall be assessed on the good on the basis of its condition at the time of its importation into the United States. Such duty shall be paid no later than 60 calendar days after either the date of exportation or the date of entry into a duty-deferral program of Canada or Mexico, except that, ...the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the good

under this section or the total amount of custom duties paid to Canada or Mexico.

19 C.F.R. § 181.53(b)(5); App., *infra*, p. 56a-57a .

STATEMENT OF THE CASE

Nufarm imported certain chemical products as TIBs under Subheading 9813.00.05, Harmonized Tariff Schedule of the United States, as "articles to be processed into articles manufactured or produced in the United States," and then exported within one year.[3] Because the goods were entered under this TIB duty deferral program, they were conditionally exempt from general ad valorem duties applicable to chemicals.[4] The imported product was shipped to a plant in Montana for processing into another herbicide product that was subsequently exported to Canada. Because the goods were exported to a NAFTA country, Nufarm after the goods' mandatory exportation filed the required customs entries as if the goods had been consumed in the United States and paid the full general ad valorem duty rate in accordance with 19 C.F.R. § 181.53 and consistent with NAFTA Article 303.

Nufarm filed timely protests pursuant to 19 U.S.C. § 1514 on the grounds that the duties were laid on exported goods in violation of the Export

---

[3] U.S. Note 1(a) Chapter 98 Subchapter XIII, Harmonized Tariff Schedule of the United States.

[4] 19 C.F.R. § 10.31.

Clause. The U.S. Customs Service ("Customs")[5] concluded that the "assessment of duty per 19 C.F.R. § 181.53 was in accordance with law and regulations" and consequently denied the protests in full.

Nufarm filed a consolidated complaint in the U.S. Court of International Trade challenging the protest denials and alleging that Customs had laid duties on certain goods by reason of their export to Canada in violation of the Export Clause. Jurisdiction was found under 28 U.S.C. § 1581(a). The parties filed cross motions for summary judgment under USCIT Rule 56 on the issue of whether duties were laid in violation of the Export Clause on certain goods by reason of their export to a NAFTA country pursuant to 19 C.F.R. § 181.53. The court granted Customs' motion for summary judgment and denied Nufarm's motion for summary judgment on the grounds that the duties were laid on the goods by reason of their import and not their export.[6]

An appeal was taken to the United States Court of Appeals for the Federal Circuit ("Federal Circuit") pursuant to 28 U.S.C. § 1295(a)(5). The Federal Circuit found that the duty "is a tax on

---

[5] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. Homeland Security Act of 2002, Pub. L. 107-296, Sec. 1502, 116 Stat. 2135, 2308-2309 (2002).

[6] The Court of International Trade opinion and order is found in the Appendix, *infra*, pp. 14a-33a.

imports, not exports" and held that the Export Clause was not violated.[7]

REASONS FOR GRANTING THE PETITION

1. THE FEDERAL CIRCUIT'S RESTRICTIVE APPLICATION OF THE EXPORT CLAUSE IS CONTRARY TO LONGSTANDING SUPREME COURT PRECEDENT PROHIBITING DUTIES ON GOODS IN EXPORT TRANSIT AND DUTIES ON SERVICES AND ACTIVITIES CLOSELY RELATED TO THE EXPORT PROCESS.

In ruling that the duties assessed pursuant to the Regulation did not violate the Export Clause because they were "a tax on imports, not exports," the Federal Circuit decision did not reach the argued issues of:

1) whether the Regulation's duties, even if an import tax, nevertheless were a tax on goods in export transit;

2) whether the Regulation's duties, even if an import tax, nevertheless were "functionally the same" as a tax on exports;

3) whether the Regulation's duties, even if an import tax, nevertheless were prohibited because the

---

[7] The Federal Circuit opinion is found in the Appendix *infra*, pp. 1a-11a.

express purpose of the assessment of the duties was regulation of export trade through application of duties on shipments to specific countries; and

4) whether the Regulation's duties were applied unconstitutionally to "services and activities closely related to the export process."

As a result, the Federal Circuit decision is a restrictive reading of the Export Clause that conflicts with the longstanding precedent of this Court in Export Clause cases.

The Export Clause's straightforward and unequivocal proscription that "No Tax or Duty shall be laid on Articles exported from any State" has been afforded a broad construction historically and consistently to prohibit Congress from laying any tax or duty on exports. *United States v. International Business Machines Corp.*, 517 U.S. 843, 861 (1996) ("*IBM*"). The Court in *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998) ("*U.S. Shoe*"), noted that "*IBM* plainly stated that the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." *U.S. Shoe,* 523 U.S. at 368. "The [Export Clause] requirement of the Constitution is that exports should be free from any government burden." *Fairbank v. United States*, 181 U.S. 283, 290 (1901).

The uniquely broad construction of the Export Clause was applied in *IBM* where the Court held that a tax or duty violates the Export Clause, even though not placed on the exports themselves, where such a charge is "functionally the same." *IBM*, 517 U.S. at 846. The issue in *IBM* was whether the Export Clause was violated by a nondiscriminatory tax upon premiums paid to foreign insurers covering export shipments. While the Court conceded that a tax on premiums for policies insuring exports is not precisely the same as a tax on the exports themselves, the Court found that they were "functionally the same under the Export Clause." 517 U.S. at 854-55, upholding *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915). The Court noted that it historically had exempted under the Export Clause not only exported goods themselves from taxation, the Export Clause "specifically prohibits Congress from regulating international commerce through export taxes [and] disallows any attempt to raise federal revenue from exports...." *IBM*, 517 U.S. at 859.

The *IBM* opinion confirmed longstanding precedent which made "clear that the Export Clause strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation." *IBM*, 517 U.S. at 848, citing *Fairbank v. United States*, 181 U.S. 283 (1901); *United States v. Hvoslef*, 237 U.S. 1 (1915); and *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915). The Court's holding, like the Export Clause, was unequivocal: "We conclude that the Export Clause does not permit assessment of nondiscriminatory

federal taxes on goods in export transit." *IBM*, 517 U.S. at 863.

Similarly, the Court ruled in *U.S. Shoe* that a charge which, regardless of its name, effectively operates as a tax or duty on exported goods violates the Export Clause. In addressing the issue of whether the challenged Harbor Maintenance Tax was a tax that violated the Export Clause, or merely a user fee, the Court observed that the "crucial question" is whether the charge is a duty on exports "in operation as well as nomenclature." *U.S. Shoe,* 523 U.S. at 367.

Consistent with the broad scope of the Export Clause, the restrictions of the Export Clause are not applied only where a general charge or exaction affects an export indirectly, tangentially and remotely. In *Wm E. Peck & Co. v. Lowe*, 247 U.S. 165 (1918), the Court did not invalidate under the Export Clause an income tax "laid generally on net incomes" because "[i]t was not laid on articles in the course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes.... At most, exportation is affected only indirectly and remotely." *Id.* at 174-175. The Export Clause restriction does not apply to pre-export goods and services, or to various services and activities only tangentially related to the export process. *IBM*, 517 U.S. at 846, 849-850. Nor does the Export Clause apply to general taxes and ordinary tax burdens on "all property similarly situated" so long as those taxes are "not levied on goods in course of exportation, nor

because of their intended exportation." *Cornell v. Coyne*, 192 U.S. 418, 427, 428 (1904).

In sum, the principal issue under the straightforward and broadly interpreted language of the Export Clause is whether a tax or duty has been laid upon exported goods or has the functional effect of burdening goods "in export transit" either directly or indirectly.

The Federal Circuit decision did not adopt this broad interpretation of the Export Clause. It held the Export Clause was not violated by applying a limited analysis of whether the duties under the regulation were simply an "import tax" or an "export tax" without reaching, as required under *IBM* and earlier precedent, the argued issues of 1) whether the Regulation's duties, even if an import tax, nevertheless were a tax on goods in export transit, 2) whether the Regulation's duties were "functionally the same" as a tax on exports, 3) whether the Regulation's duties were prohibited because the express purpose of the assessment of the duties was regulation of export trade through assessment of duties because of shipments to specific countries, and 4) whether the Regulation's duties were applied unconstitutionally to "services and activities closely related to the export process."

In ruling that the duties assessed under the Regulation were not unconstitutional under the Export Clause, the Federal Circuit decision first approved the Court of International Trade holding that "The language in the challenged regulation clearly requires that the duties in question are to

apply to the goods as a result of their status as imports, not as exports." 521 F.3d at 1369; App. *infra*, p. 5a-8a. It next found that:

> [T]he entire regulation, read in context, refers to a duty on imports deferred until the time of export. The duty, however, is a tax on imports, not exports. Consequently, the regulation is not unconstitutional on its face.

Id. Reading the Regulation "in context," the court determined that, "The regulation begins with a reference to 'a good imported into the United States.' The terms 'exportation' or 'exported good' are each, in turn, merely references back to the imported good."[8] *Id.* at 1368-69; App. *infra*, p. 3a-8a. Thus viewed, the language of the Regulation, "the exported good shall be subject to duty," did not render the Regulation facially unconstitutional.

The court then found that the Regulation was not unconstitutional "as applied." *Id.* at 1370; App. *infra*, p. 8a-10a. This conclusion was based on the limited analysis of whether the "timing" of the assessment upon export, *id.*, the "regulatory language that ties the due date to export", *id.*, and the Regulation's requirement of listing the export date on the Customs entry summary, together

---

[8] The Federal Circuit's finding that the term "exported good" references back to the "imported good" is not supported by the record which established that under the TIB requirements the imported materials, *i.e.* chemical acids, were processed into "another good," *i.e.* a herbicide, that was exported to Canada. 477 F. Supp. 2d at 1291; App. *infra*, p. 15a; 521 F.3d at 1367; App. *infra*, p. 2a-3a.

function to "convert the import duty into an export tax." *Id.* The court adopted the distinction between the duty's being "imposed" at time of import and merely "assessed" under the Regulation at time of export to conclude that the duty was a tax on imports rather than a duty laid on exports. *Id.*

The Federal Circuit's interpretation and application of the Export Clause was incorrectly restrictive when essentially limited to the question of whether the duties were an "import duty converted into an export tax." *Id.* Instead, the correct inquiry under the broad interpretation of the Export Clause established under *IBM, U.S. Shoe* and earlier precedent should have been whether a duty has been laid upon goods "in export transit," or has the functional effect of burdening directly or indirectly either an export or "services and activities closely related to the export process."

There is no question but that the Regulation's duties function as a burden laid on goods by reason of their being in the export process and then exported. When Nufarm's goods were first entered as "articles to be processed into articles manufactured or produced in the United States," the goods were required to be exported within one year.[9] Thus, the goods were imported under a classification requiring their use (rather than consumption) in the

---

[9] U.S. Note 1(a) Chapter 98 Subchapter XIII Harmonized Tariff Schedule of the United States. The requirement to export within one year is secured by a bond, *id.*, and failure to export within the time permitted results in liquidated damages equal to double the applicable estimated duties. 19 C.F.R. § 10.39(d)(1).

United States for production of another good, the exportation of which was mandatory immediately at time of importation. The Regulation's duties burden goods that are in the "export process" immediately upon importation until their required export.

Nufarm would not have paid duty on the goods pursuant to the Regulation but for the fact that they were exported to Canada rather than to a non-NAFTA country. Customs itself acknowledged in its Denial of Plaintiff's Protest that, "[s]hipping the chemicals to Canada triggered the assessment per 19 C.F.R. 181.53...." HQ228931, August 28, 2001, at 4. It is significant for purposes of the Export Clause that for all goods imported under duty deferral programs, the requirement under the Regulation to pay duty is avoided by exporting to a non-NAFTA country and arises by exporting to a NAFTA country. Regardless of whether the duties are characterized as an "import tax," the Regulation's requirement, timing and manner for payment of duties become obligatory and arise from the operative fact that the goods were imported under a duty deferral program for export and were then subsequently exported to Canada or Mexico.

While the Federal Circuit held that duties laid on the goods pursuant to the Regulation were constitutional because they were general import duties that were merely "assessed" on goods entered into a duty deferral program upon their subsequent exportation to a NAFTA country, 521 F.3d at 1370; App. *infra*, p. 8a-10a, the Court in *A.G. Spalding & Brothers v. Edward*, 262 U.S. 66 (1923) long ago rejected the argument that a duty or tax which

burdens an export is exempt from Export Clause restrictions because it is imposed under a general law:

> The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant if in this case the tax was "laid on Articles exported from any State," because that is forbidden in terms by the Constitution (citations omitted). Articles in course of transportation cannot be taxed (citation omitted)...[W]e have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary. In this case, for instance, while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants.

Id. at 69.

Because the imported materials in Nufarm's case were "intended for export" by virtue of their entry into a duty deferral program and manufactured "with specific reference to foreign wants" under a TIB for processing before mandatory export, the fact that the general import duties were "imposed under a general law touching all sales of

the class, and not aimed specially at exports" similarly does not help the defendant in this case. *Id.*

The language of the Export Clause and its broad application do not support the Federal Circuit's distinction between duties "imposed" as an "import tax" and then merely "assessed" on goods in the process of export. The general mandate that no tax or duty shall be "laid" on articles exported from any State in no way states or suggests a procedural distinction that duties burdening exports are acceptable so long as they are merely assessed on exported goods after being imposed as a general import tax. The Court in *IBM* specifically held, "We conclude that the Export Clause does not permit *assessment* of nondiscriminatory federal taxes on goods in export transit." *IBM*, 517 U.S. at 863; emphasis added. The fact that the tax was assessed rather than imposed did not have legal effect under the Export Clause.

The language of the Regulation leaves no doubt that the duties are laid upon an exported good regardless of whether they are considered an "import tax" that is simply "assessed" under the Regulation. Under the Regulation, when a good is imported into a duty deferral program and subsequently exported to Canada or Mexico, then "the exported good shall be subject to duty." 19 C.F.R. § 181.53(a)(2)(i)(A); App. *infra*, p.45a.[10] Although the Federal Circuit

---

[10] Consistent with this provision of the Regulation, the "Recordkeeping requirements" provision of the Regulation refers to "duty on goods exported to Canada or Mexico." 19 C.F.R. § 181.53(c); App. *infra*, p. 57a.

saw its way clear to conclude that the Regulation's references to "exportation" and "exported good" were "merely references back to the imported goods," those exported goods nonetheless were expressly "subject to duty" under the Regulation and had a duty functionally "laid" upon them ultimately by virtue the fact that they were in export transit and were exported to Canada rather than to a non-NAFTA country.

Even if the duties assessed under the Regulation in this case are considered import duties, they do not fall within the exceptions to the prohibition of the Export Clause. Because the duties are applied specifically under the Regulation only to goods imported into duty deferral programs for export and then "subsequently exported" to Canada or Mexico, they are not an ordinary tax burden applied to all entered goods, are not applied to pre-exported goods, and are not tangentially related to the export process. *IBM* at 846, 849-850. They are specifically occasioned by and related to the export process and the fact of an export to specified countries. The Regulation and Article 303, like the unconstitutional Harbor Maintenance Tax in *U.S. Shoe*, "'could not have imposed the Tax any closer to exportation, or more immediate to the articles exported.'" *U.S. Shoe*, 523 U.S. at 364.

The operation and functional effect of burdening the exports to Canada or Mexico with duties under the Regulation are demonstrated conclusively by the fact that this restriction was intended expressly by Congress in its adoption of Article 303 and its enabling of the Regulation. The

House legislative history of the NAFTA Implementation Act states:

> Section 203 implements the limitations on drawback established under NAFTA Article 303, entitled "Restriction on Drawback and Duty Deferral Programs,"...Article 303 of the NAFTA strictly limits drawback and duty deferral programs on trade between the NAFTA Parties.
>
> Section 203, when fully implemented, serves to remove the trade distorting provisions of the drawback laws by placing restrictions on duty drawback on trade between NAFTA countries. This is critical to ensure that none of the NAFTA countries can become an "export platform" for materials produced in other regions of the world.

House Report 103-361(I) at 40, 19913 U.S.C.C.A.N. 2553, 2590.

Despite Congress' intended purpose, its power to tax exports directly or indirectly is strictly prohibited by the Export Clause as is its power to regulate international commerce through export taxes or their functional equivalent. The Court noted in *IBM*:

> Whether [the Export Clause] provision is or is not wise [in contrast to other government policies of taxation] is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises

> which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress....
>
> The better reading [of the Export Clause], that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all.

IBM, 517 U.S. at 848, 861, *citing Fairbank v. United States*, 181 U.S. 283, 290 (1901).

Although the Export Clause "specifically prohibits Congress from regulating international commerce" through export taxes or their functional equivalent, *IBM*, 517 U.S. at 859, the Regulation expressly and impermissibly regulates international commerce by laying duties discriminatorily on goods that have been entered into duty deferral programs for export and subsequently exported to a NAFTA country. The Federal Circuit's reliance upon the holding that the duties were an "import tax" assessed under the Regulation does not overcome the Export Clause's complete prohibition against the tax's express and intended discriminatory effect from being laid on goods in the course of export to a NAFTA country.

The fourth inquiry required under the Court's Export Clause precedent, but unaddressed by the courts below in this matter, is whether under the broad interpretation given the Export Clause the Regulation's duties directly or indirectly burden not

only the exported goods, but also services and activities closely related to export process.

The duty deferral programs restricted in NAFTA trade by the Article 303 and the Regulation, *e.g.* Foreign Trade Zones, bonded warehouses and TIBs,[11] are longstanding and commonly used mechanisms under customs law that are designed to encourage U.S. export trade through the exemption of duties on imported materials used in exported goods.[12] They are intended, designed and used as services and activities specifically dedicated to the export process.

Irrespective of whether the Regulation's duties are placed directly or indirectly on the exported goods, those duties are assessed for the express and specific policy purpose of restricting export trade to Canada and Mexico through the services and activities of duty deferral programs used in the export process. As the Court in *IBM* noted, however, "our cases have broadly exempted from federal taxation not only export goods, but also services and activities closely related to the export process." *IBM*, 517 U.S. at 846.

---

[11] Five duty deferral programs are restricted by the Regulation. 19 C.F.R. § 181.53(b)(1)-(5); App. *infra*, p. 51a-57a.

[12] For example, the preamble to the Foreign-Trade Zones Act of 1934 states that the Act provides for the establishment, operation and maintenance of foreign-trade zones "to expedite and encourage foreign commerce." Foreign-Trade Zones Act of 1934, c. 590, 48 Stat. 998; S. Rep. No. 73-905, at 1 (1934); H.R. Rep. No. 73-1521, at 1 (1934).

Nufarm's use of a duty deferral program under United States customs law is a service and activity closely related to the export process that is within the scope of Export Clause protections and therefore may not be regulated through duties imposed because of that use.

In sum, the Federal Circuit found that the Regulation's duties were constitutional by concluding simply that those duties were "a tax on imports, not exports" and therefore did not violate the Export Clause. Were this limited analysis applied to the facts in *IBM*, the conclusion would be that the tax is merely a tax on insurance premiums, not exports, and therefore does not violate the Export Clause. The Court's Export Clause cases, however, require additional analysis consistent with the broad interpretation arising from the straightforward language of the Export Clause. The Federal Circuit failed to follow that precedent by not analyzing further whether the Regulation's duties, even if general import duties, nevertheless were laid upon goods in the course of export transit, were functionally the same as an export duty, regulated export trade through the application of duties, and were effectively a tax on services and activities closely related to the export process.

2. **DISCRETIONARY REVIEW BY THIS COURT IS COMPELLED BY A) THE REQUIREMENT THAT ONLY THIS COURT CAN REVERSE ITS EARLIER PRECEDENT; B) THE COURT'S STATED INTENTION TO REEXAMINE THE ISSUE OF DUTIES ON EXPORT SERVICES AND ACTIVITIES; C) THE FACT THAT ONLY THIS COURT CAN REVIEW FEDERAL CIRCUIT PRECEDENT IN INTERNATIONAL TRADE CASES; AND D) THE GENERAL PUBLIC, COMMERCIAL AND ECONOMIC IMPORTANCE OF THE ISSUE ON APPEAL.**

The Federal Circuit's decision not to prohibit duties applied by Regulation to goods in export transit and services and activities closely related to the export process is a misapplication of longstanding Supreme Court precedent in *IBM, U.S. Shoe* and earlier Export Clause cases. It is compelling for purposes of the Court's grant of discretionary jurisdiction that the Federal Circuit's decision appears to be the only case where the protections of the Export Clause have not been applied to goods completely in the course of export transit. Only this Court can determine that its broad interpretation and application of the Export Clause established in previous holdings should now be reversed in connection with goods and activities entirely within the course of export.

The Court has indicated previously that the Export Clause issue of an assessment related to activities or services closely connected to the export process is an issue to be addressed by this Court in

the future. In *IBM,* the Court invalidated taxes on goods in export transit, but indicated:

> Reexamination of the question whether a particular assessment on an activity or service is so closely connected to the goods as to amount to a tax on the goods themselves must await another day.

IBM, 517 U.S. at 863. Because the duties laid under the Regulation are for the express purpose of restricting the use of duty deferral programs in export trade to Canada and Mexico, this case provides the Court the opportunity to review this issue.

Furthermore, because the Federal Circuit has exclusive and specialized national jurisdiction over international trade matters arising out of the United States Court of International Trade,[13] only this Court has the opportunity and ability to correct Federal Circuit precedent that incorrectly limits the protections of the Export Clause against duties applied to goods in export transit and to international trade export services and activities.

The issue on appeal is of importance to the public generally in that importers, manufacturers and exporters effectively are foreclosed by the Regulation's duties from utilizing in trade to Canada and Mexico the basic duty deferral programs otherwise intended and available for export trade. The economic and commercial implications of the

---

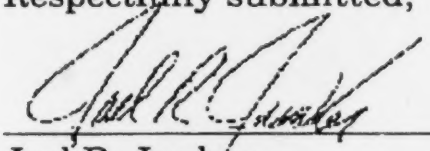
[13] 28 U.S.C. § 1295(a)(5).

issue on appeal are significant in that these duties unconstitutionally burden substantial export trade with Canada and Mexico, the two largest export markets of the United States.[14] Discovery in the trial court proceeding revealed that tens of millions of dollars have been collected under the Regulation at issue. These discriminatory duties further tend to burden and discourage manufacturing particularly in those states that border Canada and Mexico where manufacture of products with conditionally duty free materials is most proximate to those adjacent export markets.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,



Joel R. Junker
Counsel of Record
JOEL R. JUNKER & ASSOCIATES
1191 Second Avenue, Suite 1800
Seattle, Washington 98101
(206) 621-7878

---

[14] *See* www.census.gov/foreign-trade/statistics/highlights/toppartners.html.

APPENDIX

PAGE(S)

Opinion and Judgment of
The United States Court of Appeals for
The Federal Circuit
entered April 7, 2008 ..... 1a

Opinion and Judgment of
The United States Court of International Trade
entered February 15, 2007 ..... 14a

U.S. CONST. Art. I, § 9, Cl. 5 ..... 37a

North American Free Trade Agreement
Article 303 ..... 38a

19 C.F.R. § 181.53 ..... 45a

Entered April 7, 2008

NUFARM AMERICA'S, INC., Plaintiff-Appellant, v. UNITED STATES, Defendant-Appellee.

2007-1220

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

521 F.3d 1366; 2008 U.S. App. LEXIS 7364; 30 Int'l Trade Rep. (BNA) 1001

April 7, 2008, Decided

PRIOR HISTORY: [**1]

Appealed from: United States Court of International Trade Judge Evan J. Wallach.
Nufarm America's, Inc. v. United States, 477 F. Supp. 2d 1290, 2007 Ct. Intl. Trade LEXIS 20 (2007)

DISPOSITION: AFFIRMED.

COUNSEL: Joel R. Junker, Joel R. Junker & Associates, of Seattle, Washington, argued for plaintiff-appellant. With him on the brief was William N. Baldwin.

Todd Hughes, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. On the brief were Jeanne E. Davidson, Director, of Washington, DC, and Barbara

S. Williams, Attorney in Charge, International Trade Field Office, of New York, New York. Of counsel on the brief was Beth C. Brotman. Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, of New York, New York.

JUDGES: Before RADER, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and PROST, Circuit Judge.

OPINION BY: RADER

OPINION

[*1367] RADER, *Circuit Judge.*

On summary judgment, the United States Court of International Trade held that 19 C.F.R. § 181.53 does not violate Article I, Section 9, Clause 5 of the United States Constitution ("the Export Clause"). *Nufarm America's, Inc. v. United States*, 477 F. Supp. 2d 1290 (CIT 2007) ("*Nufarm II*"). The trial court also denied Nufarm America's, Inc.'s, [**2] ("Nufarm's") motion for class certification under USCIT Rule 23(c). *Nufarm America's, Inc. v. United States*, 398 F. Supp. 2d 1338 (CIT 2005) ("*Nufarm I*"). Because 19 C.F.R. § 181.53 does not violate the Export Clause and the class certification issue is moot, this court affirms.

I

Nufarm imported chemical products into the United States from Australia and the Netherlands. The products entered under Harmonized Tariff

Schedule ("HTSUS") Subheading 9813.00.05, which defers the import duty on goods imported for repair, alteration, or processing until the goods are exported. Nufarm processed the imported chemicals into herbicides and then exported that product to Canada. At the time of export, the United States Customs Service assessed a deferred duty on the goods under 19 C.F.R. § 181.53.

Nufarm protested that 19 C.F.R. § 181.53 violates the Export Clause of the Constitution. On August 9, 2001, Customs denied the protest explaining that the regulation imposes liability for the duty at the time of importation and not exportation. Customs explained that 19 C.F.R. § 181.53 simply defers payment of the duty on some goods until a later export without transforming the import duty into an export [**3] duty.

II

As a threshold matter, this court declines to entertain any challenges raised for the first time on appeal regarding Article 303 of the North American Free Trade Agreement ("NAFTA") and its implementing statute U.S. Note 1(c), chapter 98, subchapter XIII, HTSUS ("U.S. Note 1(c)"). Because the Court of International Trade has not received the opportunity to consider and decide any questions involving NAFTA and U.S. Note 1 (c), those issues are not ripe for appeal. *Henke v. United States*, 60 F.3d 795, 802 (Fed. Cir. 1995) (Rader, J., dissenting) ("Courts of appeal generally will not entertain arguments or consider issues raised for the first time in appeal. This court only does so in rare cases to

avoid injustice."). Accordingly, this court devotes its attention solely to the constitutionality of the deferred duty regulation and refers to U.S. Note 1(c) only to provide context for its implementing regulation, 19 C.F.R. § 181.53.

When the Court of International Trade grants summary judgment, this court reviews that decision "for correctness as a matter of law, deciding de novo the proper interpretation of the governing statute and regulations as well as whether genuine issues of [**4] material fact exist." *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539, 1543 (Fed. Cir. 1994) (quoting *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993)). This court must also interpret and enforce the provisions of the Constitution without any deference for the trial court decision.

The Export Clause of the United States Constitution provides: "No Tax or Duty shall be laid on articles exported from any State." U.S. Const. art. I, § 9, cl. 5. The United States Supreme Court has recently interpreted this clause to bar a "tax" for harbor maintenance on exports, *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 11 S. Ct. 1290, 140 L. Ed. 2d 453 (1998) (holding that the Harbor Maintenance Tax ("HMT") is an impermissible tax on exports and does not qualify as a permissible user fee), and to bar a tax on export transit goods. *United States v. IBM Corp.*, 517 U.S. 843, 845, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996) (holding that the United States Constitution does not permit the imposition of a generally applicable, nondiscriminatory federal tax on goods in export

transit). Reading these cases broadly, Nufarm contends that 19 C.F.R. § 181.53 also violates the Export Clause both on its face and as applied. On its face, 19 C.F.R. § 181.53 [**5] expressly refers to a duty on imports, not exports:

> *Where a good is imported into the United States pursuant to a duty-deferral program and is subsequently withdrawn from the duty-deferral program for exportation to Canada or Mexico* or is used as a material in the production of another good that is subsequently withdrawn from the duty-deferral program for exportation to Canada or Mexico, and provided that the good is a "good subject to NAFTA drawback" within the meaning of 19 U.S.C. § 3333 and is not described in § 181.45 of this part, the documentation required to be filed under this section in connection with the exportation of the good shall, for purposes of this chapter, constitute an entry or withdrawal for consumption and *the exported good shall be subject to duty which shall be assessed in accordance with paragraph (b) of this section.*

19 C.F.R. § 181.53(a)(2)(i)(A) (emphases added). Thus, the regulation begins with reference to "a good imported into the [*1369] United States." The terms "exportation" or "exported good" are each, in turn, merely references back to the imported good.

Sub-section (b), referenced in the last line of the provision above, states:

> Except in the case of a good imported from Canada or Mexico for repair or alteration, where a good [**6], regardless of its origin, was imported temporarily free of duty for repair, alteration or processing (subheading 9813.00.05, Harmonized Tariff Schedule of the United States) and is subsequently exported to Canada or Mexico, duty shall be *assessed on the good on the basis of its condition at the time of its importation* into the United States. Such duty shall be paid no later than 60 calendar days after either the date of exportation or the date of entry into a duty-deferral program of Canada or Mexico, except that, upon filing of a proper claim under paragraph (a)(3) of this section, the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.

19 C.F.R. § 181.53(b)(5) (emphasis added). This subsection assesses the duty on the import based on its condition at the time of importation, thus further distinguishing this fee from an export tax or duty.

The Court of International Trade accurately determined that the regulation imposes an import

duty, but postpones its collection [** 7] until the time of export: "The language in the challenged regulation clearly requires that the duties in question are to apply to the goods as a result of their status as imports, not as exports." *Nufarm II* at 1295.

This court appreciates that an isolated clause from 19 C.F.R. § 181.53(a)(2)(i)(A) states that "the exported good shall be subject to duty. . . ." Similarly, another isolated phrase observes that "*where a good . . . was imported* temporarily free of duty for repair, alteration or processing . . . *and is subsequently exported* to Canada or Mexico, duty shall be *assessed on the good.*" (emphases added). Taken out of context, those passages suggest an impermissible tax or duty on exports. These excerpts, however, are merely isolated strands of the entire fabric of the regulation. When those strands are woven back into the fabric where they belong, the entire context shows that the regulation imposes a duty on imports, not exports. The opening phrase of the regulation refers to the "imported" good. All later "exported goods" passages are merely references, in different terms, to the imported goods.

Moreover the phrase "the exported good shall be subject to duty" reads in context [**8] "the exported good shall be subject to duty *which shall be assessed in accordance with paragraph (b) of this section.*" 19 C.F.R. § 181.53(a)(2)(i)(A) (emphasis added). The reference to paragraph (b), as noted earlier, assesses the duty on the good as an import and in the condition of the good at the time of import, even though the regulation defers collection until the time of export.

Thus, the entire regulation, read in context, refers to a duty on imports deferred until the time of export. The duty, however, is a tax on imports, not exports. Consequently, the regulation is not unconstitutional on its face.

The language of U.S. Note 1(c)—the basis for the regulation in the first place—also shows that the duty falls on imports. As mentioned before, the provision under which Nufarm's chemicals were entered, Subheading 9813.00.05 HTSUS, provides for a temporary duty-free entry for repair, alteration, or processing. U.S. Note 1(c) describes the operation of this temporary deferral:

> [*1370] For purposes of this subchapter, *if an article imported into the United States, for processing, under heading 9813.00.05 is withdrawn for exportation to the territory of Canada or of Mexico, the duty assessed* [**9] *shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the article that would have been payable on importation* under chapters 1 through 97, inclusive, of the Harmonized Tariff Schedule of the United States or the total amount of customs duties paid to Canada or to Mexico on the exported article, unless such article is covered by section 203(a)(1) through 203(a)(8), inclusive, of the NAFTA Implementation Act . . .

U.S. Note 1(c), chapter 98, subchapter XIII, HTSUS (emphasis added). This language attaches the duty to "an article imported into the United States" and assesses an amount, on the basis, in part, of the amount "payable on importation."

This court also perceives no merit in the challenge to the constitutionality of the regulation as applied. This court is aware that the obligation to pay the duty only arises upon export to a NAFTA country, but the timing does not convert the import duty into a tax on exports. The liability to pay this duty arises under HTSUS Subheading 9813.00.05 upon import. To ease correct assessment, the regulation merely postpones collection of the import duty until the time of export. An imported product [**10] destined for a NAFTA country receives a different assessment that an imported product destined for a non-NAFTA country. Depending on the ultimate destination of an import, the duty assessment could even be zero. Therefore, the regulation effects a deferral to ensure proper calculation of duty rates. None of this transforms the import duty into an export duty. Indeed, in all circumstances the liability to pay a duty attaches at import. The regulation imposes a duty on imports but defers calculation and collection of the exact amount of the vested liability.

In *Ammex, Inc. v. United States*, this court analyzed the terms imposed and assessed. 419 F.3d 1342 (Fed. Cir. 2005). *Assessment* was found to refer to a recordation of the calculated amount of liability, while *imposition* was found to be the creation, but not calculation of, a liability. *See id.* at 1345 ("While

assessment determines the specific amount of liability, imposition is simply a statement that liability exists."). Applying these definitions to the situation at hand, 19 C.F.R. § 181.53 imposes liability upon import while postponing the assessment of the amount of the previously imposed importation duty.

The express due date [**11] of the duty payment in 19 C.F.R. § 181.53, 60 days after export, also does not operate to make the regulation unconstitutional as applied. The regulatory language that ties the due date to export does not convert the import duty into an export tax. This timing clause operates to set a time for the accrual and computation of interest. Once again, this procedure does not change the imposition of liability at importation.

Likewise, the requirement to list a date of export on the Customs Entry Summary does not convert this import duty into an export tax. This filing information sets the 60-day deadline in motion. Neither this procedure nor the use of bonds to secure payment indicates that the duty is on exports. In sum, this court detects no error in the trial court's determination that the regulation does not place an unconstitutional tax on exports.

III

Nufarm also appeals the trial court's denial of class certification. *Nufarm I*. The class would consist of all individuals who paid duties pursuant to 19 C.F.R. § 181.53 [*1371] (duty deferral programs).

The Court of International Trade held that because 28 U.S.C. § 1581(a) was manifestly adequate, 28 U.S.C. § 1581(i), which covers residual jurisdiction, [**12] was unavailable. This court's decision upholding the constitutionality of 19 C.F.R. § 181.53 renders the issue of class certification moot. Even if this court were to allow other members into the class, their arguments regarding the constitutionality of the regulation would fail. Consequently, the appeal of *Nufarm I* is dismissed as moot.

IV

In sum, because the trial court did not err in its decision regarding the constitutionality of 19 C.F.R. § 181.53, this court affirms.

AFFIRMED

United States Court of Appeals for the Federal Circuit

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 04/07/08

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and petitions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellant(s) under Rule 39. The party entitled to costs is provided a bill of costs form and instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases

between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.

JAN HORBALY
Clerk

cc: Joel R. Junker
Barbara S. Williams

NUFARM AMERICA'S V US, 2007-1120
CIT, 02-00162

Entered February 15, 2007

LEXSEE 477 F. SUPP. 2D 1290

NUFARM AMERICA'S, INC., Plaintiff,
v.
UNITED STATES, Defendant.

Consol. Court No.: 02-00162

UNITED STATES COURT OF INTERNATIONAL TRADE

477 F. Supp. 2d 1290; 29 Int'l Trade Rep. (BNA) 1417; 2007 Ct. Intl. Trade LEXIS 20; SLIP OP. 2007-23

February 15, 2007, Decided

SUBSEQUENT HISTORY: Affirmed by Nurfarm America's, Inc. vs. United States, 2008 U.S. App. LEXIS 7364 (Fed Cir., Apr. 7, 2008)

PRIOR HISTORY: Nufarm America's, Inc. vs. United States, 398 F. Supp. 2d 1338, 2005 Ct. Intl. Trade LEXIS 145 (Ct. Int'l Trade, 2005)

DISPOSITION: [**1] Plaintiff's Motion for Summary Judgment is DENIED and Defendant's Cross-Motion for Summary Judgment is GRANTED.

COUNSEL: Joel R. Junker & Associates (Joel R. Junker), for Plaintiff NuFarm America's, Inc.

Robert D. McCallum, Jr., Assistant Attorney General, Barbara S. Williams, Acting Attorney in

Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; Beth C. Brotman, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, for Defendant United States.

JUDGES: Evan J. Wallach, Judge.

OPINION BY: Evan J. Wallach

OPINION

[*1291] **Wallach, Judge:**

I

INTRODUCTION

Plaintiff Nufarm America's, Inc. ("Nufarm") argues that the requirement to file a consumption entry and to pay duty and related fees upon export to Canada on merchandise imported temporarily under bond, pursuant to 9813.00.05, Harmonized Tariff Schedule of the United States ("HTSUS") (2000), under 19 C.F.R. § 181.53, promulgated pursuant to the North American Free Trade Agreement ("NAFTA") Implementation Act in accordance with NAFTA Article 303, violates Article I, Section 9, Clause 5 of the United States Constitution (" the [**2] Export Clause"). This court has jurisdiction pursuant to 28 U.S.C. § 1581(a). Because the duties in question are related to the merchandise's importation and not its export, the statute remains within constitutional limitations

and Plaintiff's Motion for Summary Judgment is denied. For these same reasons, Defendant's Cross-Motion for Summary Judgment is granted.

II

BACKGROUND

Nufarm imported chemical products into the United States under HTSUS subheading 9813.00.05 as articles to be processed into articles manufactured or produced in the United States; as a result the products were entered temporarily free of duty, and duties were deferred until the time of export.[1] Consolidated Complaint ("Complaint") ¶ 13; Answer to Consolidated Complaint ("Answer") ¶ 1, 13. The imported chemicals were subject to duty at the general ad valorem rates for chemicals falling under

---

[1] "The Temporary Importation Under Bond [TIB] classification is a special program under the tariff schedule. The requirements of 19 C.F.R. § 181.53, among others, are permissible conditions placed upon the option to temporarily defer duty by importing goods under bond for specific enumerated purposes (see Subchapter XIII, Chapter 98, (HTSUS)). An importer at the time of entry may choose either to present the merchandise under a TIB provision and post a bond or make a consumption entry and pay the duty. HQ 228931 (August 9, 2001) (Further Review of Protest No. 3001-00-100227).

subheading 2918.90.20,[2] HTSUS, but payment of those duties were deferred because the merchandise was entered under subheading 9813.00.05.[3] Defendant's Statement of Undisputed Facts ¶ 1. Once processed, the new product was then exported to Canada.[4] Complaint ¶ 15; Answer ¶ 15. Following [**3] the export to Canada, Plaintiff filed the required consumption entries and paid the full duty rate, applicable merchandise processing fees, and made an offer in compromise to the United States

---

[2] HTSUS Subheading 2918.90.20 provides:

> 2918 Carboxylic acids with additional oxygen function and their anhydrides, halides, peroxides, and peroxyacids; their halogenated, sulfonated, nitrated, or nitrosated derivatives (con.):
>
> * * *
>
> 2918.90.20 Other 9.3% 1/ Free (A, CA, E, IL, J, MX)

[3] HTSUS Subheading 9813.00.05 provides:

> Articles to be repaired, altered or processed (including processes which result in articles manufactured or produced in the United States).....Free (CA, IL, MX)

[4] There was no Canadian duty on the products at the time of export; as a result, Plaintiff paid the full U.S. duty rate on the entered values for the imported merchandise, at the general ad valorem duty rates applicable to goods classified under subheading 2918.90.20 during the years in which Nufarm's chemicals were imported. Complaint ¶¶ 15, 19; Defendant's Statement of Undisputed Facts ¶ 2.

Customs Service ("Customs")[5] that resulted in the cancellation of liquidated damages. Defendant's Response to Plaintiff's Statement of Material Facts at 2; Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment ("Plaintiff's Response") at 15; letter from Joel R. Junker to the court, dated January 25, 2007, Docket No. 90. Plaintiff's consumption entries were liquidated, and it timely filed related protests based on the claim that assessment of duties under 19 C.F.R. § 181.53 violates the Export Clause.[6] Complaint ¶ 20; Answer ¶ 20.

[**5] Nufarm's protests on its entries at the Port of Seattle were denied on August 28, 2001, and its protests on the entries at the Port of Chicago were denied on March 27, 2002, after Customs' Further Review. Complaint ¶ 22; Answer ¶ 22. Customs concluded in its determination that the "[a]ssessment of duty per 19 C.F.R. § 181.53 was in accordance with law and regulations," was therefore constitutional, and denied Plaintiff's protest in full. Complaint ¶ 22 (quoting HQ 228931).

---

[5] The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. See H.R. Doc. No. 108-32 (2003).

[6] Plaintiff filed the following protests related to its liquidated consumption entries: Port of Seattle Protests: Protest Nos. 3001-00-100227, 3001-00-100196, 3001-01-100049; Port of Chicago Protests: Protest Nos. 3901-01-100296, 3901-01-100979, 3901-01-101008, 3901-01-101135, 3901-01-101178, 3901-01-101043.

On March 13, 2003, the court consolidated Nufarm America's, Inc. v. United States, Court No. 02-00571 under Nufarm America's, Inc. v. United States, Court No. 02-00162. Motions under review in this opinion are Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. Oral Argument was held on January 17, 2007.

III

STANDARD OF REVIEW

The standard of review when determining whether an agency's regulation violates the Constitution involves a presumption of constitutionality on behalf of the regulation. *See Motor Vehicles Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 443 (1983) (finding that regulations [**6] enjoy a presumption of validity, albeit one not as strong as that accorded to statutes promulgated by Congress). When looking at an agency's interpretation of a statute by Congress,[7] a court is to give deference to the agency after determining:

> whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . . If, however, the court determines Congress has not directly addressed the precise question

---

[7] Plaintiff does not challenge the constitutionality of the related statutes in this action.

> at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Customs regulations interpreting the tariff statute are entitled to the heightened degree of *Chevron* deference. *Haggar Apparel Co. v. United States*, 526 U.S. 380, 392, 119 S. Ct. 1392, 143 L. Ed. 2d 480 (1999).

[**7] [*1293] In determining the outcome of a motion for summary judgment, a court must look to whether there remain any "genuine issues as to any material fact" in dispute on the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2509, 91 L. Ed. 2d 202, 211 (1986). The inquiry therefore is not into factual matters, but whether either party is entitled to a judgment as a matter of law. *Id.* Under USCIT R. 56(c), summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c).

IV

DISCUSSION

Plaintiff argues that 19 C.F.R. § 181.53[8] is unconstitutional both on its face and in effect

---

[8] 19 C.F.R. § 181.53(a)(2) states, in pertinent part:

> Where a good is imported into the United States pursuant to a duty-deferral program and is subsequently withdrawn from the duty-deferral program for exportation to Canada or Mexico or is used as a material in the production of another good that is subsequently withdrawn from the duty-deferral program for exportation to Canada or Mexico, and provided that the good is a "good subject to NAFTA drawback" within the meaning of 19 U.S.C. 3333 and is not described in § 181.45 of this part, the documentation required to be filed under this section in connection with the exportation of the good shall, for purposes of this chapter, constitute an entry or withdrawal for consumption and the exported good shall be subject to duty which shall be assessed in accordance with paragraph (b) of this section.

19 C.F.R. § 181.53(a)(2)(i)(A). In addition, 19 C.F.R. § 181.53(b)(5) states:

> Temporary importation under bond . . . duty shall be assessed on the good on the basis of its condition at the time of its importation into the United States. Such duty shall be paid no later than 60 calendar days after either the date of exportation or the date of entry into a duty-deferral program of Canada or Mexico, except that, upon filing of a proper claim under paragraph (a)(3) of this section, the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.

19 C.F.R. § 181.53(b)(5).

because it violates the Export Clause's prohibition on placing a tax or duty on items in the course of their export. Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion") at 5. According to Nufarm, the regulation always operates unconstitutionally by its own terms because it provides for the assessment of duties [**8] at the time of export on merchandise that was previously imported. *Id.* at 5-6. Nufarm further argues that the regulation is unconstitutional in its operation, stating that the charge or exaction at issue is a duty that applies directly to exports. *Id.* at 8. Because Plaintiff interprets the policy and structure of 19 C.F.R. § 181.53 as requiring the assessment of duty as a *result* of the product's export to Canada or Mexico, Plaintiff concludes that the Constitution's prohibition on taxes and duties on exports from the United States is violated by the operation of the regulation. *Id.*

[**9] Defendant counters that 19 C.F.R. § 181.53 does not violate the Export Clause because the liability for the duty was imposed at the time of the product's importation into the United States; the payment of the duty was simply deferred until the goods were exported to another NAFTA country. Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment ("Defendant's Memo") at 2. The Government points to duty deferral provisions in U.S. Note 1(c), chapter 98, subchapter XIII, HTSUS, and in the subheading under which Nufarm's goods were entered (9813.00.05, HTSUS), as well as to NAFTA Article 303, which detail how duty deferral works and how

previously imposed duties are calculated once deferral is no longer applicable.[9] *Id.* at 5-6. Defendant concludes that because the duties in question are to be imposed based on an event prior to exportation and are merely assessed at the time of exportation, the regulation is constitutional both on its face and in operation. *Id.* at 15.

[**10] **A**

Plaintiff Bears the Burden of Overcoming the Presumption of Validity

The Export Clause of the United States Constitution reads, "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. 1, § 9, cl. 5. This prohibition has been construed by the Supreme Court to "categorically bar[ ] Congress from imposing any tax on exports." *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 363, 118 S. Ct. 1290, 140 L. Ed. 2d 453 (1998) (citing *United States v. Int'l Bus. Machines Corp. (IBM)*, 517 U.S. 843, 852, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996)). Further, the Court has held that "a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional

---

[9] Deferred duties are waived upon export to non-NAFTA countries and imposed upon export to NAFTA countries, with reduction of duty possible in certain circumstances. U.S. Note 1(c), chapter 98, subchapter XIII, HTSUS.

prohibition." *Turpin v. Burgess*, 117 U.S. 504, 507, 6 S. Ct. 835, 29 L. Ed. 988 (1886).

In order for a regulation to be deemed unconstitutional, Plaintiff must overcome the basic presumption of validity. Thus, "the elementary rule is that every reasonable construction must be resorted to, in order to save a [statute] from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) [**11] (quoting *Hooper v. California*, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L. Ed. 297 (1895)). Though the presumption of validity for an agency's regulation is somewhat less than that afforded to an act of Congress, *Motor Vehicle Manufacturers Ass'n of U.S., Inc.*, 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443, Nufarm still has the burden of overcoming a presumption that the regulation follows Congressional intent and is therefore constitutional. *See Moon v. Freeman*, 379 F.2d 382, 391 (9th Cir. 1967) (finding that the burden of demonstrating that a law is unconstitutional falls on the party challenging its validity).

B

19 C.F.R. § 181.53 Does Not Facially Violate the Export Clause

Plaintiff claims that 19 C.F.R. § 181.53 is unconstitutional on its face. Plaintiff's Motion at 6. Defendant responds that, when looking at the regulation's language in its full context and alongside the relevant NAFTA and HTSUS provisions, the regulation is within constitutional

constraints because the duty in question is explicitly intended to be assessed on the goods as imported, not in relation to their status as exports. Defendant's Memo at 14-15; *see* North American Free [**12] Trade Agreement, U.S.-Can.-Mex, December 17, 1992, 32 I.L.M. 289 (1993).

NAFTA provides a system of trade preference for its member countries. Article 303[10] seeks to avoid the abuse of trade [*1295] preferences in the form of duty deferral by requiring that duties be paid on non-NAFTA components of goods exported to NAFTA countries, thus guarding against the establishment of "export platforms," or importing goods solely for the purpose of later exporting them in order to avoid duties that would have otherwise

---

[10] NAFTA Article 303(3) states:

> Where a good is imported into the territory of a Party pursuant to a duty deferral program and is subsequently exported to the territory of another Party, or is used as a material in the production of another good that is subsequently exported to the territory of another Party, or is substituted by an identical or similar good used as a material in the production of another good that is subsequently exported to the territory of another Party, the Party from whose territory the good is exported:
>
> a) shall assess the customs duties as if the exported good had been withdrawn for domestic consumption; and
> b) may waive or reduce such customs duties to the extent permitted under paragraph 1.

NAFTA art. 303(3), 32 I.L.M. at 683, implemented by the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 stat. 2057 (1993).

been assessed. Customs implements Article 303 in 19 C.F.R. § 181.53, which reads, in pertinent part:

> Except in the case of a good imported from Canada or Mexico for repair or alteration, where a good, regardless of its origin, was imported temporarily free of duty for repair, alteration or processing (subheading 9813.00.05, Harmonized Tariff Schedule of the United States) and is subsequently exported to Canada or Mexico, duty shall be assessed on the good on the basis of its condition at the time of its importation into the United States. Such duty shall be paid no later than 60 calendar days after either the date of exportation or the date of entry into a dutydeferral [**13] program of Canada or Mexico, except that, upon filing of a proper claim under paragraph (a)(3) of this section, the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.

19 C.F.R. § 181.53(b)(5). The regulation thus specifically provides for a duty that is to be deferred and then later "assessed on the good *on the basis of its condition at the time of its importation* into the United States." *Id.* (emphasis added).

[**14] Plaintiff misinterprets the language of 19 C.F.R. § 181.53 in its Motion.[11] The regulation's language presents a clear implementation of a duty deferral process, tracking the stated intent of NAFTA Article 303. The language in the challenged regulation clearly requires that the duties in question are to apply to the goods as a result of their status as imports, not as exports. Thus, 19 C.F.R. § 181.53 is not unconstitutional on its face.

C

19 C.F.R. § 181.53 is Constitutional in Effect

Plaintiff also argues that the regulation is unconstitutional in operation, [**15] claiming that duties are imposed under the regulation not because of the fact that the goods were imported to the United States or because of their alteration, repair, or processing, but rather because the goods were exported specifically to a NAFTA [*1296] country. Plaintiff's Motion at 9. Thus, according to Nufarm, for all other imports the obligation to pay duty is avoided by exporting to a non-NAFTA country and arises by failing to export, and this discrepancy amounts to a violation of the Export Clause. *Id.* Defendant responds that the entire policy and structure of the regulation involves the calculation of

---

[11] For example, Plaintiff uses the following excerpt from 19 C.F.R. § 181.53: "*[W]here a good* . . . was imported temporarily free of duty for repair, alteration or processing . . . and *is subsequently exported* to Canada or Mexico, *duty* shall be *assessed on the good* . . . ." Plaintiff's Motion at 6. The complete sentence provides that the duty is assessed on the basis of the condition of the good at the time of its import.

previously imposed but temporarily deferred duties, emphasizing that they are import, not export, duties. Defendant's Memo at 15. The Government further notes the distinction between taxes and duties *imposed* on goods at the time of exportation versus those *assessed* at the time of exportation but imposed at an earlier time. *Id.* Because the duties in question were not imposed but assessed at the time of export, Defendant argues, the regulation is constitutional in operation. *Id.*

The constitutional prohibition of duties on exports "does not mean that articles exported [**16] are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the *export* and not to the article *before* its exportation." *Cornell v. Coyne*, 192 U.S. 418, 427, 24 S. Ct. 383, 48 L. Ed. 504, T.D. 757 (1904) (emphasis added); *see A.G. Spalding & Bros. v. Edward*, 262 U.S. 66, 43 S. Ct. 485, 67 L. Ed. 865 (1923) (holding that when a taxed sale occurs in the export *process* the tax is unconstitutional); *Consolidation Coal Co. v. United States*, 64 Fed. Cl. 718, 724 (Ct. Fed. Cl. 2005) ("Both sides agree that the fee would be constitutional if imposed solely on extraction, which would be the equivalent of the manufacturing stage in *Cornell.* On the other hand, given defendant's concession that the sale occurs in the export process, the fee, if held to be a tax, would be unconstitutional pursuant to *A.G. Spalding* if imposed at the time the coal is sold." (citation omitted)). In *Pace v. Burgess*, 92 U.S. 372, 23 L. Ed. 657 (1876), the Supreme Court discussed the export exemption in the context of a stamp tax placed on tobacco bound for export, stating:

> The plaintiff contends that the charge for the stamps required to be placed on packages of manufactured tobacco intended for exportation was and is a duty on exports . . . . But it is manifest that such was not its character or object. The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or of ten cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. *It bore no proportion whatever to the quantity or value of the package on which it was affixed.*[12]

---

[12] Plaintiff asserted during oral argument that upholding the regulation as it is written would be doing something no court has ever done in the application of the Export Clause. The courts have clearly established that the proper construction of the Export Clause is that no tax or duty can be cast upon the process of exporting goods. However, the regulation in question places no such duty on export. Rather the duty is imposed on the goods *before* their export, as was distinguished in *Cornell* and *Consolidation Coal*. *Cornell*, 192 U.S. 418; *Consolidation Coal*, 64 Fed. Cl. at 724 (citing *Pace*, 92

Id. at 374-75 (emphasis added). Clearly there is a distinction between charges imposed for reasons independent of the export process and those in place due to an item's export.

[**18] The duty set forth by 19 C.F.R. § 181.53 is in place due to the goods' import into the United States, not their export. Plaintiff mistakes the distinction in its argument by looking to the fact that goods exported to non-NAFTA countries are treated differently than goods exported to NAFTA countries, rather than pinpointing the time at which the duty was imposed in order to determine whether all items are similarly situated. *See* Plaintiff's Motion at 9. The issue is first whether the duty is placed on all imports alike. In such a circumstance, the deferral of duties is a temporary option for importers, providing for the assessment of the duty at a later time, which in this case coincides with the export of the goods. Ultimately, every importer meeting the 19 C.F.R. § 181.53 standard has the same option of paying the duty immediately or deferring payment to a later

---

U.S. 372; *Turpin*, 117 U.S. at 507). Thus, the assessments made in *Pace* when the Court upheld the charges on items to be exported as well as those made in *Consolidation Coal, Cornell, Turpin*, and others are directly applicable here. Though in later cases such as *U.S. Shoe Corp.*, 523 U.S. at 369, and *Moon*, 379 F.2d at 389-90, courts focused on the distinction between a tax or duty and a regulation when applying *Pace*, the analysis quoted in the text above arrives at the conclusion of constitutionality using a reasoning similar to that used here and is equally applicable in light of the guidelines provided by *Cornell* and *Consolidation Coal*.

date.[13] The fact that events occurring subsequent to importation could result in the waiver or reduction of the duty is irrelevant to the analysis of whether all goods are similarly situated regarding its implementation.

[**19] As in *Pace*, the duty at issue here is not a tax on goods being exported. Rather, 19 C.F.R. § 181.53 implements the guidelines provided by NAFTA Article 303 and U.S. Note 1(c) regarding import duty deferral. Much like the measure in *Pace*, the purpose behind these duty deferral provisions is in part to prevent abuse, this time by discouraging the use of the United States as an "export platform." The regulation in question clearly meets constitutional standards by imposing duties on imports, allowing for temporary duty deferral, and then assessing duties at the time of export. *See Ammex, Inc. v. United States*, 341 F. Supp. 2d 1308 (CIT 2004), *aff'd*, 419 F.3d 1342 (Fed. Cir. 2005) (distinguishing "assessment," meaning fixing of specific amounts of liability, from "imposition," meaning the responsibility to pay a particular duty, and finding that assessment of duty upon export is within constitutional constraints). As the constitutional focus is on the imposition of duties and not their assessment, the duty deferral process set forth in 19 C.F.R. § 181.53 escapes Export Clause duty exemption. Plaintiff therefore fails to meet its burden; because [**20] the regulation operates as an

---

[13] Defendant declined to argue that the choice to use 19 C.F.R. § 181.53 to defer duty until export constitutes a waiver of a known right.

import duty and not a duty on exports, 19 C.F.R. § 181.53 is constitutional in effect.

V

CONCLUSION

For the reasons stated above, Nufarm's Motion for Summary Judgment is denied and the Government's Cross-Motion for Summary Judgment is granted.

/s/ Evan J. Wallach, Judge

Dated: February 15, 2007

New York, New York

JUDGMENT ORDER

This case having come before the court upon the Motion for Summary Judgment filed by Plaintiff Nufarm America's, Inc. ("Plaintiff's Motion"), and the Cross Motion for Summary Judgment filed by Defendant United States Government ("Defendant's Motion"); the court having reviewed all papers and [*1298] pleadings on file herein, having heard oral argument by each party, and after due deliberation, having reached a decision herein; now, in conformity with said decision, it is hereby

ORDERED ADJUDGED AND DECREED that Plaintiff's Motion is DENIED, and it is further

ORDERED ADJUDGED AND DECREED that Defendant's Motion is GRANTED.

/s/ Evan J. Wallach, Judge

Dated: February 15, 2007

New York, New York

UNITED STATES COURT OF
INTERNATIONAL TRADE

NUFARM AMERICA'S, INC.,	
Plaintiff,	
v.	Before: Wallach, Judge
UNITED STATES,	Court No.: 02-00162
Defendant.	

JUDGMENT ORDER

This case having come before the court upon the Motion for Summary Judgment filed by Plaintiff Nufarm America's, Inc. ("Plaintiff's Motion"), and the Cross Motion for Summary Judgment filed by Defendant United States Government ("Defendant's Motion"); the court having reviewed all papers and pleadings on file herein, having heard oral argument by each party, and after due deliberation, having reached a decision herein; now, in conformity with said decision, it is hereby

ORDERED ADJUDGED AND DECREED that Plaintiff's Motion is DENIED, and it is further

ORDERED ADJUDGED AND DECREED that Defendant's Motion is GRANTED.

_____/s/ Evan J. Wallach_____
Evan J. Wallach, Judge

Dated: February 15, 2007
New York, New York

NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgment was entered in the docket of this action and was served upon the parties on the date shown below.

Service was made by depositing a copy of this order or judgment, together with any papers required by USCIT Rule 79(c), in a securely closed envelope, proper postage attached, in a United States mail receptacle at One Federal Plaza, New York, New York 10278 and addressed to the attorney of record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clerical employee designated, by the Attorney-In-Charge in a writing filed with the clerk of the court.

or

Service was made electronically, by the Court's CM/ECF system, upon those parties that have filed a Notice of Consent to Electronic Service.

Tina Potuto Kimble
Clerk of the Court

Date: February 15, 2007

By: /s/ Steve Taronji
Deputy Clerk

United States Constitution Article I, Sec. 9, Cl. 5

No tax or duty shall be laid on articles exported from any state.

North American Free Trade Agreement
Article 303:

1. Except as otherwise provided in this Article, no Party may refund the amount of customs duties paid, or waive or reduce the amount of customs duties owed, on a good imported into its territory, on condition that the good is:

a) subsequently exported to the territory of another Party,

b) used as a material in the production of another good that is subsequently exported to the territory of another Party, or

c) substituted by an identical or similar good used as a material in the production of another good that is subsequently exported to the territory of another Party, in an amount that exceeds the lesser of the total amount of customs duties paid or owed on the good on importation into its territory and the total amount of customs duties paid to another Party on the good that has been subsequently exported to the territory of that other Party.

2. No Party may, on condition of export, refund, waive or reduce:

a) an antidumping or countervailing duty that is applied pursuant to a Party's domestic law and that is not applied inconsistently with Chapter Nineteen (Review and Dispute

Settlement in Antidumping and Countervailing Duty Matters);

b) a premium offered or collected on an imported good arising out of any tendering system in respect of the administration of quantitative import restrictions, tariff rate quotas or tariff preference levels;

c) a fee applied pursuant to section 22 of the U.S. Agricultural Adjustment Act, subject to Chapter Seven (Agriculture and Sanitary and Phytosanitary Measures); or

d) customs duties paid or owed on a good imported into its territory and substituted by an identical or similar good that is subsequently exported to the territory of another Party.

3. Where a good is imported into the territory of a Party pursuant to a duty deferral program and is subsequently exported to the territory of another Party, or is used as a material in the production of another good that is subsequently exported to the territory of another Party, or is substituted by an identical or similar good used as a material in the production of another good that is subsequently exported to the territory of another Party, the Party from whose territory the good is exported:

a) shall assess the customs duties as if the exported good had been withdrawn for domestic consumption; and

b) may waive or reduce such customs duties to the extent permitted under paragraph 1.

4. In determining the amount of customs duties that may be refunded, waived or reduced pursuant to paragraph 1 on a good imported into its territory, each Party shall require presentation of satisfactory evidence of the amount of customs duties paid to another Party on the good that has been subsequently exported to the territory of that other Party.

5. Where satisfactory evidence of the customs duties paid to the Party to which a good is subsequently exported under a duty deferral program described in paragraph 3 is not presented within 60 days after the date of exportation, the Party from whose territory the good was exported:

a) shall collect customs duties as if the exported good had been withdrawn for domestic consumption; and

b) may refund such customs duties to the extent permitted under paragraph 1 on the timely presentation of such evidence under its laws and regulations.

6. This Article does not apply to:

a) a good entered under bond for transportation and exportation to the territory of another Party;

b) a good exported to the territory of another Party in the same condition as when imported into the territory of the Party from which the good was exported (processes such as testing, cleaning, repacking or inspecting the good, or preserving it in its same condition, shall not be considered to change a good's condition). Except as provided in Annex 703.2, Section A, paragraph 12, where such a good has been commingled with fungible goods and exported in the same condition, its origin for purposes of this subparagraph, may be determined on the basis of the inventory methods provided for in the Uniform Regulations established under Article 511 (Uniform Regulations);

c) a good imported into the territory of a Party that is deemed to be exported from its territory, or used as a material in the production of another good that is deemed to be exported to the territory of another Party, or is substituted by an identical or similar good used as a material in the production of another good that is deemed to be exported to the territory of another Party, by reason of

(i) delivery to a duty-free shop,

(ii) delivery for ship's stores or supplies for ships or aircraft, or

(iii) delivery for use in joint undertakings of two or more of the Parties and that will subsequently

become the property of the Party into whose territory the good was deemed to be imported;

d) a refund of customs duties by a Party on a particular good imported into its territory and subsequently exported to the territory of another Party, where that refund is granted by reason of the failure of such good to conform to sample or specification, or by reason of the shipment of such good without the consent of the consignee;

e) an originating good that is imported into the territory of a Party and is subsequently exported to the territory of another Party, or used as a material in the production of another good that is subsequently exported to the territory of another Party, or is substituted by an identical or similar good used as a material in the production of another good that is subsequently exported to the territory of another Party; or

f) a good set out in Annex 303.6.

7. Except for paragraph 2(d), this Article shall apply as of the date set out in each Party's Section of Annex 303.7.

8. Notwithstanding any other provision of this Article and except as specifically provided in Annex 303.8, no Party may refund the amount of customs duties paid, or waive or reduce the amount of

customs duties owed, on a non-originating good provided for in item 8540.11.aa (color cathode-ray television picture tubes, including video monitor tubes, with a diagonal exceeding 14 inches) or 8540.11.cc (color cathode ray television picture tubes for high definition television, with a diagonal exceeding 14 inches) that is imported into the Party's territory and subsequently exported to the territory of another Party, or is used as a material in the production of another good that is subsequently exported to the territory of another Party, or is substituted by an identical or similar good used as a material in the production of another good that is subsequently exported to the territory of another Party.

9. For purposes of this Article:

customs duties are the customs duties that would be applicable to a good entered for consumption in the customs territory of a Party if the good were not exported to the territory of another party;
identical or similar goods means "identical or similar goods" as defined in Article 415 (Rules of Origin Definitions);
material means "material" as defined in Article 415;
used means "used" as defined in Article 415.

10. For purposes of the Article:

Where a good referred to by a tariff item number in this Article is described in parentheses following the tariff item number, the description is provided for purposes of reference only.

19 C.F.R. § 181.53

a) *General* —(1) *Definitions.* The following definitions shall apply for purposes of this section:

(i) *Date of exportation.* "Date of exportation" means the date of importation into Canada or Mexico as reflected on the applicable Canadian or Mexican entry document (see §181.47(c) (1) and (2)).

(ii) *Duty-deferral program.* A "duty-deferral program" means any measure which postpones duty payment upon arrival of a good in the United States until withdrawn or removed for exportation to Canada or Mexico or for entry into a Canadian or Mexican duty-deferral program. Such measures govern manipulation warehouses, manufacturing warehouses, smelting and refining warehouses, foreign trade zones, and those temporary importations under bond that are specified in paragraph (b)(5) of this section.

(2) *Treatment as entered or withdrawn for consumption* —(i) *General.* (A) Where a good is imported into the United States pursuant to a duty-deferral program and is subsequently withdrawn from the duty-deferral program for exportation to Canada or Mexico or is used as a material in the production of another good that is subsequently withdrawn from the duty-deferral program for exportation to Canada or Mexico, and provided that the good is a "good subject to NAFTA drawback" within the meaning of 19 U.S.C. 3333 and is not described in §181.45 of this part, the documentation required to be filed under this section in connection

with the exportation of the good shall, for purposes of this chapter, constitute an entry or withdrawal for consumption and the exported good shall be subject to duty which shall be assessed in accordance with paragraph (b) of this section.

(B) Where a good is imported into the United States pursuant to a duty-deferral program and is subsequently withdrawn from the duty-deferral program and entered into a duty-deferral program in Canada or Mexico or is used as a material in the production of another good that is subsequently withdrawn from the duty-deferral program and entered into a duty-deferral program in Canada or Mexico, and provided that the good is a "good subject to NAFTA drawback" within the meaning of 19 U.S.C. 3333 and is not described in §181.45, the documentation required to be filed under this section in connection with the withdrawal of the good from the U.S. duty-deferral program shall, for purposes of this chapter, constitute an entry or withdrawal for consumption and the withdrawn good shall be subject to duty which shall be assessed in accordance with paragraph (b) of this section.

(C) Any assessment of duty under this section shall include the duties and fees referred to in §181.42 (a) through (c) and the fees provided for in §24.23 of this chapter; these inclusions shall not be subject to refund, waiver, reduction or drawback.

(ii) *Bond requirements.* The provisions of §142.4 of this chapter shall apply to each withdrawal and exportation transaction described in paragraph (a)(2)(i) of this section. However, in applying the

provisions of §142.4 of this chapter in the context of this section, any reference to release from Customs custody in §142.4 of this chapter shall be taken to mean exportation to Canada or Mexico.

(iii) *Documentation filing and duty payment procedures* —(A) *Persons required to file.* In the circumstances described in paragraph (a)(2)(i) of this section, the documentation described in paragraph (a)(2)(iii)(B) of this section must be filed by one of the following persons:

(*1*) In the case of a withdrawal of the goods from a warehouse, the person who has the right to withdraw the goods;

(*2*) In the case of a temporary importation under bond (TIB) specified in paragraph (b)(5) of this section, the TIB importer whether or not he sells the goods for export to Canada or Mexico unless §10.31(h) of this chapter applies; or

(*3*) In the case of a withdrawal from a foreign trade zone, the person who has the right to make entry. However, if a zone operator is not the person with the right to make entry of the good, the zone operator shall be responsible for the payment of any duty due in the event the zone operator permits such other person to remove the goods from the zone and such other person fails to comply with §§146.67 and 146.68 of this chapter.

(B) *Documentation required to be filed and required filing date.* The person required to file shall file Customs Form 7501 no later than 10 working days

after the date of exportation to Canada or Mexico or 10 working days after being entered into a duty-deferral program in Canada or Mexico. Except where the context otherwise requires and except as otherwise specifically provided in this paragraph, the procedures for completing and filing Customs Form 7501 in connection with the entry of merchandise under this chapter shall apply for purposes of this paragraph. For purposes of completing Customs Form 7501 under this paragraph, any reference on the form to the entry date shall be taken to refer to the date of exportation of the good or the date the goods are entered into a duty-deferral program in Canada or Mexico. The Customs Form 7501 required under this paragraph may be transmitted electronically.

(C) *Duty payment.* The duty estimated to be due under paragraph (b) of this section shall be deposited with Customs 60 calendar days after the date of exportation of the good. If a good is entered into a duty-deferral program in Canada or Mexico, the duty estimated to be due under paragraph (b) of this section, but without any waiver or reduction provided for in that paragraph, shall be deposited with Customs 60 calendar days after the date the good is entered into such duty-deferral program. Nothing shall preclude the deposit of such estimated duty at the time of filing the Customs Form 7501 under paragraph (a)(2)(iii)(B) of this section or at any other time within the 60-day period prescribed in this paragraph. However, any interest calculation shall run from the date the duties are required to be deposited.

(3) *Waiver or reduction of duties* —(i) *General.* Except in the case of duties and fees referred to in §§181.42(a) through (c) and fees provided for in §24.23 of this chapter, Customs shall waive or reduce the duties paid or owed under paragraph (a)(2) of this section by the person who is required to file the Customs Form 7501 (see paragraph (a)(2)(iii)(A) of this section) in accordance with paragraph (b) of this section, provided that a claim for waiver or reduction of the duties is filed with Customs within the appropriate 60-day time frame. The claim shall be based on evidence of exportation or entry into a Canadian or Mexican duty-deferral program and satisfactory evidence of duties paid in Canada or Mexico (see §181.47(c)).

(ii) *Filing of claim and payment of reduced duties.* A claim for a waiver or reduction of duties under paragraph (a)(3)(i) of this section shall be made on Customs Form 7501 which shall set forth, in addition to the information required under paragraph (a)(2)(iii)(B) of this section, a description of the good exported to Canada or Mexico and the Canadian or Mexican import entry number, date of importation, tariff classification number, rate of duty and amount of duty paid. If a claim for reduction of duties is filed under this paragraph, the reduced duties shall be deposited with Customs when the claim is filed.

(iii) *Drawback on goods entered into a duty-deferral program in Canada or Mexico.* After goods in a duty-deferral program in the United States which have been sent from the United States and entered into a duty-deferral program in Canada or Mexico are then

withdrawn from that Canadian or Mexican duty-deferral program either for entry into Canada or Mexico or for export to a non-NAFTA country, the person who filed the Customs Form 7501 (see paragraph (a)(2)(iii)(A) of this section) may file a claim for drawback if the goods are withdrawn within 5 years from the date of the original importation of the good into the United States. If the goods are entered for consumption in Canada or Mexico, drawback will be calculated in accordance with §181.44 of this part.

(4) *Liquidation of entry* —(i) *If no claim is filed.* If no claim for a waiver or reduction of duties is filed in accordance with paragraph (a)(3) of this section, Customs shall determine the final duties due under paragraph (a)(2)(i) of this section and shall post a bulletin notice of liquidation of the entry filed under this section in accordance with §159.9 of this chapter. Where no claim was filed in accordance with this section and Customs fails to liquidate, or extend liquidation of, the entry filed under this section within 1 year from the date of the entry, upon the date of expiration of that 1-year period the entry shall be deemed liquidated by operation of law in the amount asserted by the exporter on the Customs Form 7501 filed under paragraph (a)(2)(iii)(A) of this section. A protest under section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), and part 174 of this chapter shall be filed within 90 days from the date of posting of the notice of liquidation under this section.

(ii) *If a claim is filed.* If a claim for a waiver or reduction of duties is filed in accordance with

paragraph (a)(3) of this section, an extension of liquidation of the entry filed under this section shall take effect for a period not to exceed 3 years from the date the entry was filed. Before the close of the extension period, Customs shall liquidate the entry filed under this section and shall post a bulletin notice of liquidation in accordance with §159.9 of this chapter. If Customs fails to liquidate the entry filed under this section within 4 years from the date of the entry, upon the date of expiration of that 4-year period the entry shall be deemed liquidated by operation of law in the amount asserted by the exporter on the Customs Form 7501 filed under paragraph (a)(3)(ii) of this section. A protest under section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), and part 174 of this chapter shall be filed within 90 days from the date of posting of the notice of liquidation under this section.

(b) *Assessment and waiver or reduction of duty* —(1) *Manipulation in warehouse.* Where a good subject to NAFTA drawback under this subpart is withdrawn from a bonded warehouse (19 U.S.C. 1562) after manipulation for exportation to Canada or Mexico or for entry into a duty-deferral program in Canada or Mexico, duty shall be assessed on the good in its condition and quantity, and at its weight, at the time of such withdrawal from the warehouse and with such additions to, or deductions from, the final appraised value as may be necessary by reason of its change in condition. Such duty shall be paid no later than 60 calendar days after the date of exportation or of entry into the duty-deferral program of Canada or Mexico, except that, upon filing of a proper claim under paragraph (a)(3) of this section, the duty shall

be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.

(2) *Bonded manufacturing warehouse.* Where a good is manufactured in a bonded warehouse (19 U.S.C. 1311) with imported materials and is then withdrawn for exportation to Canada or Mexico or for entry into a duty-deferral program in Canada or Mexico, duty shall be assessed on the materials in their condition and quantity, and at their weight, at the time of their importation into the United States. Such duty shall be paid no later than 60 calendar days after either the date of exportation or of entry into a duty-deferral program of Canada or Mexico, except that, upon filing of a proper claim under paragraph (a)(3) of this section, the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the materials under this section or the total amount of customs duties paid to Canada or Mexico.

Example. Company N imports tea into the United States and makes a Class 6 warehouse entry. Company N manufactures sweetened ice tea mix by combining the imported tea with refined cane sugar and other flavorings and packaging it in retail size canisters. Upon withdrawal of the ice tea mix from the warehouse for exportation to Canada, a Customs Form 7501 is filed showing $900 in estimated U.S. duties on the basis of the unmanufactured tea. Upon entry into Canada, the equivalent of US$800 is assessed on the exported ice tea mix. Company N submits to Customs a proper claim under paragraph

(a)(3) of this section showing payment of the US$800 equivalent in duties to Canada. Company N will only be required to pay $100 in U.S. duties out of the $900 amount reflected on the Customs Form 7501.

(3) *Bonded smelting or refining warehouse.* For any qualifying imported metal-bearing materials (19 U.S.C. 1312), duty shall be assessed on the imported materials and the charges against the bond canceled no later than 60 calendar days after either the date of exportation of the treated materials to Canada or Mexico or the date of entry of the treated materials into a duty-deferral program of Canada or Mexico, either from the bonded smelting or refining warehouse or from such other customs bonded warehouse after the transfer of the same quantity of material from a bonded smelting or refining warehouse. However, upon filing of a proper claim under paragraph (a)(3) of this section, the duty on the imported materials shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the imported materials under this section or the total amount of customs duties paid to Canada or Mexico.

Example. Company Z imports 47 million pounds of electrolytic zinc which is entered into a bonded smelting and refining warehouse (Class 7) for processing. Thereafter, Company Z withdraws the merchandise for exportation to Canada and files a Customs Form 7501 showing $90,000 in estimated U.S. duty on the dutiable quantity of metal contained in the imported metal-bearing materials. Upon entry of the processed zinc into Canada, the equivalent of US$50,000 in duties are assessed. Within 60 days of exportation Company Z files a

proper claim under paragraph (a)(3) of this section and Customs liquidates the entry with duty due in the amount of $40,000.

(4) *Foreign trade zone.* For a good that is manufactured or otherwise changed in condition in a foreign trade zone (19 U.S.C. 81c(a)) and then withdrawn from the zone for exportation to Canada or Mexico or for entry into a Canadian or Mexican duty-deferral program, the duty assessed, as calculated under paragraph (b)(4)(i) or (b)(4)(ii) of this section, shall be paid no later than 60 calendar days after either the date of exportation of the good to Canada or Mexico or the date of entry of the good into a duty-deferral program of Canada or Mexico, except that, upon filing of a proper claim under paragraph (a)(3) of this section, the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.

(i) *Nonprivileged foreign status.* In the case of a nonprivileged foreign status good, duty is assessed on the good in its condition and quantity, and at its weight, at the time of its exportation from the zone to Canada or Mexico or its entry into a duty-deferral program of Canada or Mexico.

Example. CMG imports $1,000,000 worth of auto parts from Korea and admits them into Foreign-Trade Subzone number 00, claiming nonprivileged foreign status. (If the auto parts had been regularly entered they would have been dutiable at 4 percent, or $40,000.) CMG manufactures subcompact

automobiles. Automobiles are dutiable at 2.5 percent ($25,000) if entered for consumption in the United States. CMG withdraws the automobiles from the zone and exports them to Mexico. Upon entry of the automobiles in Mexico, CMG pays the equivalent of US$20,000 in duty. Before the expiration of 60 calendar days from the date of exportation, CMG files a proper claim under paragraph (a)(3) of this section and pays $5,000 in duty to Customs representing the difference between the $25,000 which would have been paid if the automobiles had been entered for consumption from the zone and the US$20,000 equivalent paid to Mexico.

(ii) *Privileged foreign status.* In the case of a privileged foreign status good, duty is assessed on the good in its condition and quantity, and at its weight, at the time privileged status is granted in the zone.

Example. O&G, Inc. admits Kuwaiti crude petroleum into its zone and requests, one month later, privileged foreign status on the crude before refining the crude into motor gasoline and kerosene. Upon withdrawal of the refined goods from the zone by O&G, Inc. for exportation to Canada, a Customs Form 7501 is filed showing $700 in estimated duties on the imported crude petroleum (rather than on the refined goods which would have been assessed $1,200). D&O is the consignee in Canada and pays the Canadian customs duty assessment of the equivalent of US$1,500 on the goods. O&G, Inc. is entitled to a waiver of the full $700 in duties upon filing of a proper claim under paragraph (a)(3) of this section.

(5) *Temporary importation under bond.* Except in the case of a good imported from Canada or Mexico for repair or alteration, where a good, regardless of its origin, was imported temporarily free of duty for repair, alteration or processing (subheading 9813.00.05, Harmonized Tariff Schedule of the United States) and is subsequently exported to Canada or Mexico, duty shall be assessed on the good on the basis of its condition at the time of its importation into the United States. Such duty shall be paid no later than 60 calendar days after either the date of exportation or the date of entry into a duty-deferral program of Canada or Mexico, except that, upon filing of a proper claim under paragraph (a)(3) of this section, the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.

Example. Company A imports glassware under subheading 9813.00.05, HTSUS. The glassware is from France and would be dutiable under a regular consumption entry at $6,000. Company A alters the glassware by etching hotel logos on the glassware. Two weeks later, Company A sells the glassware to Company B, a Mexican company, and ships the glassware to Mexico. Company B enters the glassware and is assessed duties in an amount equivalent to US$6,200 and claims NAFTA preferential tariff treatment. Company B provides a copy of the Mexican landing certificate to Company A showing that the US$6,200 equivalent in duties was assessed but not yet paid to Mexico. If Mexico ultimately denies Company B's NAFTA claim and

the Mexican duty payment becomes final, Company A, upon submission to Customs of a proper claim under paragraph (a)(3) of this section, is entitled to a waiver of the full $6,000 in U.S. duty.

(c) *Recordkeeping requirements.* If a person intends to claim a waiver or reduction of duty on goods under this section, that person shall maintain records concerning the value of all involved goods or materials at the time of their importation into the United States and concerning the value of the goods at the time of their exportation to Canada or Mexico or entry into a duty-deferral program of Canada or Mexico, and if a person files a claim under this section for a waiver or reduction of duty on goods exported to Canada or Mexico or entered into a Canadian or Mexican duty-deferral program, that person shall maintain evidence of exportation or entry into a Canadian or Mexican duty-deferral program and satisfactory evidence of the amount of any customs duties paid to Canada or Mexico on the good (see §181.47(c)). Failure to maintain adequate records will result in denial of the claim for waiver or reduction of duty.

(d) *Failure to file proper claim.* If the person identified in paragraph (a)(2)(iii)(A) of this section fails to file a proper claim within the 60-day period specified in this section, that person, or the FTZ operator pursuant to paragraph (a)(2)(iii)(A)(*3*) of this section, will be liable for payment of the full duties assessed under this section and without any waiver or reduction thereof.

(e) *Subsequent claims for preferential tariff treatment.* If a claim for a refund of duties is allowed by the Canadian or Mexican customs administration under Article 502(3) of the NAFTA or under any other circumstance after duties have been waived or reduced under this section, Customs may reliquidate the entry filed under this section pursuant to 19 U.S.C. 1508(b)(2)(B)(iii) even after liquidation of the entry has become final.

[T.D. 96–14, 61 FR 2911, Jan. 30, 1996; T.D. 96–14, 61 FR 6111, Feb. 16, 1996]

File Date:
Oct 8 2008

2

No. 08-31

In the Supreme Court of the United States

NUFARM AMERICA'S INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
JEANNE E. DAVIDSON
TODD M. HUGHES
BARBARA S. WILLIAMS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Although import duties are generally imposed on goods imported into the United States, those duties can be refunded, or their payment can be deferred and ultimately waived, if the goods are used to manufacture articles that are then exported to another country that will apply its own import duties. Pursuant to a statute and regulation that implement a provision of the North American Free Trade Agreement (NAFTA), goods that are imported into the United States and used to manufacture articles that are exported to other NAFTA countries are eligible for a refund or waiver of import duties only to the extent the exported manufactured goods are subjected to import duties by the other NAFTA party. The question presented is as follows:

Whether the failure to waive import duties on goods brought into the United States and processed here before the manufactured item is exported duty-free to Canada violates the Export Clause, U.S. Const. Art. I, § 9, Cl. 5.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 12

TABLE OF AUTHORITIES

Cases:

A.G. Spalding & Bros. v. *Edwards*, 262 U.S. 66 (1923) 7, 8, 9, 10
Cornell v. *Coyne*, 192 U.S. 418 (1904) 7, 8, 10
Merck v. *United States*, 435 F. Supp. 2d 1253 (Ct. Int'l Trade 2006), aff'd, 499 F.3d 1348 (Fed. Cir. 2007) 11
Turpin v. *Burgess*, 117 U.S. 504 (1886) 7

Constitution, treaty, statutes and regulations:

U.S. Const. Art. I, § 9, Cl. 5 (Export Clause) 5, 7, 8, 12
North American Free Trade Agreement, *done* Dec. 17, 1992, 32 I.L.M. 289 2
Art. 302, 32 I.L.M. 300 2
Art. 303(1)(a), 32 I.L.M. 300 3
Art. 303(3), 32 I.L.M. 300 3
Harmonized Tariff Schedule of the United States:
General note 1 1
Ch. 29:
Subch. XVIII:
Subheading 2918.90.20 ..... 4, 5, 6, 7

Treaty, statute and regulations—Continued: Page

Ch. 98:
Subch. XIII:
U.S. note 1(a) 4
U.S. note 1(c) 3, 6
Subheading 9813.00.05 ..... 4, 6
19 U.S.C. 1311 ..... 2, 3
19 U.S.C. 1313(a) 2
19 U.S.C. 1313(n) 3
19 C.F.R.:
Section 19.15(f) 2
Section 19.15(g)(1) 2
Section 19.15(*l*) 2
Section 181.44(a) 4
Section 181.53 ..... 5, 6
Section 181.53(b)(2) 4, 7
Section 181.53(b)(5) 4, 7
Section 191.21 2

Miscellaneous:

H.R. Rep. No. 361, 103d Cong., 1st Sess. Pt. 1 (1993) 2

In the Supreme Court of the United States

No. 08-31

NUFARM AMERICA'S INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 521 F.3d 1366. The opinion of the Court of International Trade (Pet. App. 14a-36a) is reported at 477 F. Supp. 2d 1290.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2008. The petition for a writ of certiorari was filed on July 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. All goods imported into the United States are subject to import duties unless specifically exempted. See Harmonized Tariff Schedule of the United States (HTSUS), General note 1. If the imported merchandise

is used to manufacture articles that are then exported, the import duties are, in certain circumstances, eligible to be refunded to the importer. Such a refund is referred to as a "drawback." 19 U.S.C. 1313(a); 19 C.F.R. 191.21. Without a drawback, the good would be subjected to import duties twice—first by the United States on the raw materials, and again on the manufactured good by the country to which the article is exported. Congress has also established an alternative procedure under which, rather than paying the import duty and seeking a drawback, the importer can temporarily bring the goods into the United States under bond, use the goods to manufacture a further article, and export the article, in which case import duties on the imported raw materials are waived. 19 U.S.C. 1311; 19 C.F.R. 19.15(f), (g)(1), and (*l*); HTSUS Subheading 9813.00.05.

In the North American Free Trade Agreement (NAFTA), *done* Dec. 17, 1992, 32 I.L.M. 289, the United States, Canada, and Mexico agreed to eliminate or reduce tariffs on goods traded between NAFTA countries. Art. 302, at 300. In light of the elimination of import duties between the countries, the parties to NAFTA sought to ensure "that none of the NAFTA countries * * * become an 'export platform' for materials produced in other regions of the world," H.R. Rep. No. 361, 103d Cong., 1st Sess. Pt. 1, at 40 (1993), *i.e.*, that importers not be able to circumvent the payment of *any* import duties by importing goods into one NAFTA country and then obtaining a drawback or waiver of that country's duty upon transferring the good to another NAFTA country duty-free. Thus, in Article 303 of NAFTA, each party agreed that it would not "refund the amount of customs duties paid, or waive or reduce the amount of customs duties owed, on a good imported into its terri-

tory, on condition that the good is * * * subsequently exported to the territory of another [NAFTA] Party," except that drawback or waiver of such duty would be permitted up to "the total amount of customs duties paid to another Party on the good that has been subsequently exported to the territory of that other Party." Art. 303(1)(a), 32 I.L.M. at 300. The parties further agreed that, where a good has been imported into one NAFTA country subject to a duty deferral program "and is subsequently exported to the territory of another Party; or is used as a material in the production of another good that is subsequently exported to the territory of another Party * * * the Party from whose territory the good is exported * * * shall assess the customs duties as if the exported good had been withdrawn for domestic consumption," except to the extent that the country to which the manufactured good is exported imposes its own import duty on that article. Art. 303(3), at 300.

Congress implemented Article 303 by providing that neither drawback nor waiver of import duties is available for imported goods that are used to manufacture articles for export to Canada or Mexico, except to the extent that the goods are subject to import duty by the other NAFTA party. 19 U.S.C. 1311, 1313(n); HTSUS Ch. 98, Subch. XIII, U.S. note 1(c). Those statutory mandates have, in turn, been implemented in Customs and Border Protection (CBP) regulations. With respect to drawbacks, "drawback of the duties previously paid upon importation of a good into the United States may be granted" up to the "total amount of duties paid on the exported good upon subsequent importation into Canada or Mexico," but the drawback may not exceed the amount of the import duties paid to the United States. 19 C.F.R. 181.44(a).

With regard to duty-deferral, HTSUS Subheading 9813.00.05 provides that "[a]rticles to be repaired, altered or processed" may be entered under bond, without payment of the import duty, subject to their exportation. HTSUS Ch. 98, Subch. XIII, U.S. note 1(a) and Subheading 9813.00.05. When an "article imported into the United States, for processing, under heading 9813.00.05" is exported to another NAFTA party, the import duty is "waived or reduced" up to "the total amount of customs duties paid to Canada or to Mexico on the exported article." *Id.* U.S. note 1(c). CBP's regulations make clear that the duty that is owed, subject to potential waiver up to the amount of "customs duties paid to Canada or Mexico," is the duty "assessed on the good on the basis of its condition at the time of its importation into the United States." 19 C.F.R. 181.53(b)(5). See also 19 C.F.R. 181.53(b)(2) (duty is "assessed on the materials in their condition and quantity, and at their weight, at the time of their importation into the United States").

2. Petitioner imported into the United States from Australia and the Netherlands certain chemicals that were subject to duty pursuant to HTSUS Subheading 2918.90.20. Pet. App. 2a, 16a-17a. Instead of paying those duties immediately, petitioner invoked HTSUS Subheading 9813.00.05 to defer payment. *Id.* at 17a. Petitioner processed the imported chemicals in the United States to produce an herbicide, which petitioner then exported to Canada. *Id.* at 3a, 17a.

The new product entered Canada duty-free. Pet. App. 17a n.4. After the manufactured product was exported to Canada, Customs liquidated import duties on petitioner's chemical entries pursuant to HTSUS Subheading 2918.90.20. Pet. App. 17a. Because Canada assessed no import duties on the herbicide, petitioner

was ineligible for a waiver or reduction of the import duties the United States had imposed on the chemical raw materials. *Id.* at 17a & n.4.

Petitioner filed protests against the liquidations. Petitioner alleged, *inter alia*, that the requirement to pay deferred import duties on raw materials at the time the finished product is exported violates the Export Clause of the Constitution, Art. I, § 9, Cl. 5, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." Pet. App. 3a. CBP denied the protests. *Ibid.*

3. Petitioner commenced this action in the United States Court of International Trade, alleging that 19 C.F.R. 181.53 violates the Export Clause by imposing a tax on exported goods. Pet. App. 15a. The court granted summary judgment in the government's favor. *Id.* at 14a-33a. The court held that references in Section 181.53 to the assessment of duties at the time of export to another NAFTA country do not establish a violation of the Export Clause because Section 181.53 relates only to the manner in which import duties imposed under HTSUS General Note 1 at the time of importation are to be calculated when their payment has been deferred. *Id.* at 24a-27a. The court likewise held that the timing of payment established in Section 181.53, which specifies that deferred import duties are payable within a specified time after export to the extent they are not waived, does not transform those import duties into a tax laid on exported articles. *Id.* at 30a-31a.

4. The court of appeals affirmed. Pet. App. 1a-11a. The court held that Section 181.53's references to payment of duties after export did not make the regulation unconstitutional on its face because "the entire regulation, read in context, refers to a duty on imports de-

ferred until the time of export." *Id.* at 8a. The court observed that the duty is collected on the "article imported into the United States." *Id.* at 9a (quoting HTSUS Ch. 98, Subch. XIII, U.S. note 1(c)). The court also rejected petitioner's "as applied" argument based on the timing of the duty assessment. *Id.* at 9a-10a. The court explained that the deferred duty assessment merely helps "to ensure proper calculation of duty rates" in light of the fact that the importer may be entitled to a waiver or reduction of the import duties if it subsequently exports the manufactured good. *Id.* at 9a.

ARGUMENT

Petitioner challenges the court of appeals' holding that 19 C.F.R. 181.53, which imposes a duty upon imported goods but permits the importer to defer payment of those duties until a potential waiver or reduction can be calculated, does not violate the Export Clause. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioner does not challenge the court of appeals' holding that the duty petitioner was required to pay was an "import tax." Pet. 13. The court's conclusion was plainly correct. The chemicals imported by petitioner were subject to duty upon importation, calculated pursuant to HTSUS Subheading 2918.90.20. Pet. App. 2a, 16a-17a. Instead of paying those duties immediately, petitioner chose to utilize HTSUS Subheading 9813.00.05 to defer payment. Pet. App. 17a. When it came time to calculate and assess the duty, CBP did so based upon the value and condition of petitioner's imported chemicals at the time they entered the United

States, pursuant to HTSUS Subheading 2918.90.20. Pet. App. 17a. That duty did not in any way depend upon the weight or value or any other characteristic of the herbicide that petitioner produced from the chemicals after they were imported into this country. See 19 C.F.R. 181.53(b)(5) ("duty shall be assessed on the good on the basis of its condition at the time of its importation into the United States"); 19 C.F.R. 181.53(b)(2) ("duty shall be assessed on the materials in their condition and quantity, and at their weight, at the time of their importation into the United States").

The court of appeals correctly held that imposition of an import tax on petitioner's imported chemicals does not violate the Export Clause. As this Court has made clear, general taxes and duties imposed prior to exportation on goods intended for export are constitutional. See *Cornell* v. *Coyne*, 192 U.S. 418, 427 (1904); *Turpin* v. *Burgess*, 117 U.S. 504 (1886). The Export Clause's command that no "tax or duty can be cast upon the exportation of articles, * * * does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated." *Cornell*, 192 U.S. at 427. Nor does it matter that the import duties in this case were imposed upon goods that, at the time of their importation, petitioner intended to use to manufacture an article that would then be exported. As the Court explained in *A.G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923) (*Spalding*), even "while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants." *Id.* at 69. See also *Cornell*, 192 U.S. at 427 ("Subjecting filled cheese manufactured for the purpose of export to the same tax as all other filled cheese

is casting no tax or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export.").

Nor does it matter that Congress allowed petitioner, at its option, to defer payment of the import duties until such time as it could be determined whether and to what extent the import duties might be waived. Petitioner does not and could not plausibly argue that its intent to use imported chemicals as raw materials to produce another article for export precludes the government from imposing and assessing import duties on those chemicals at the time of importation. See *Spalding*, 262 U.S. at 69; *Cornell*, 192 U.S. at 427. Nor does petitioner argue that it violates the Export Clause for Congress to grant drawback of import duties upon the export of articles made from imported goods.

The Export Clause prohibits the laying of taxes on exports; it does not prohibit Congress from refunding import duties in order to facilitate international trade. Thus, petitioner's argument boils down to a contention that it violates the Constitution for Congress to adopt a system that allows importers, for their convenience and at their option, to defer payment of a legal import duty until it can be determined whether the importer might be entitled, upon later export, to a partial or complete waiver of the import duty. Nothing in this Court's cases construing the Export Clause supports such a rule.

2. Although petitioner does not challenge the court of appeals' determination that the duties at issue here were "import duties," petitioner contends that the court erred by failing to consider whether assessment of those import duties violated the Export Clause under one of four different tests that petitioner contends the Court has adopted. Pet. 13, 23. Even under the alternative

tests offered by petitioner, the duties at issue here do not violate the Export Clause.

a. Petitioner contends (Pet. 15-18) that collection of import duties on petitioner's chemicals was forbidden because those chemicals were "in the 'export process' immediately upon importation until their required export." Pet. 16. That is so, petitioner maintains, because they "were 'intended for export' by virtue of their entry into a duty deferral program and manufactured 'with specific reference to foreign wants.'" Pet. 17 (quoting *Spalding*, 262 U.S. at 69). Petitioner's reliance on *Spalding* is misplaced. The Court in that case recognized and applied its prior holding in *Cornell* that "while the goods were in process of manufacture they *were none the less subject to taxation*" even though they were "intended for export and made with specific reference to foreign wants." 262 U.S. at 69 (emphasis added). *Spalding* defined the "export process" as starting with "[t]he overt act of delivering the goods to the carrier." *Id.* at 70.

In this case, the exported good—the pesticide—did not even exist at the time the import duties were imposed on the imported chemicals. Under *Cornell* and *Spalding*, it would have been entirely permissible to impose a tax upon the manufacturing of petitioner's pesticide, even if that end product were intended for exportation. Because petitioner's pesticide was placed in transit for export only after it was processed in the United States, the duties imposed on the raw material chemicals at the earlier stage of importation were not imposed on goods in the "export process."

b. Petitioner argues (Pet. 18-19) that the import duties were "functionally 'laid'" upon petitioner's exported goods because the applicability of the duties de-

pends under the regulation on the circumstances under which the goods are ultimately exported—and, in particular, on whether the goods are exported to Canada or Mexico rather than to some other country. Contrary to petitioner's contention, the import duties related entirely to petitioner's importation of chemicals. The duties were calculated based on the nature and character of the goods imported at the time of import and according to the tariff rate applicable to the imported goods, without reference to the nature or value of the manufactured product that was subsequently exported.

The fact and circumstances of export were relevant only to the extent that petitioner might have received a *waiver or reduction* of the import duties if it had exported the finished product to a country that charged an import duty. In the event, petitioner was not entitled to any reduction because its exported goods were not subjected to import duties by Canada. But a failure to waive import duties based on the fact and circumstances of subsequent export is no more the functional equivalent of an export duty than is the failure to waive a manufacturing tax because of ultimate export. This Court's decisions make clear that there is no requirement to refund a manufacturing tax simply because the manufactured good is later exported. See *Spalding*, 262 U.S. at 69; *Cornell*, 192 U.S. at 427.

Nothing in this Court's decisions suggests that the current statutory and regulatory regime violates the Export Clause simply because an importer's obligation to pay import duties depends under some circumstances on the country to which the goods are subsequently exported. The drawback and waiver mechanisms serve to prevent the double taxation that would otherwise be imposed if particular goods were subjected to import

duties both by the United States and by the country to which those goods are subsequently exported. See p. 2, *supra*. Congress's decision to make drawback and waiver available in circumstances where double taxation would otherwise occur did not compel it to provide like relief where (as here) that concern is absent.

c. Petitioner maintains (Pet. 19-21) that the duty-deferral program violates the Export Clause because it "regulate[s] international commerce through export taxes or their functional equivalent." As explained above, see pp. 6-8, 10-11 *supra*, the import duties at issue here are neither "export taxes" nor their "functional equivalent." Petitioner's contention that NAFTA has the "functional effect of burdening the exports to Canada or Mexico" is wholly without merit. NAFTA *frees* trade between the United States, Canada, and Mexico by eliminating import duties on trade between them.

In light of that fact, import-duty drawback programs and similar duty-deferral programs would be inappropriate. Their application to NAFTA exports would allow companies importing goods into NAFTA countries to avoid import duties altogether by the simple expedient of first shipping the goods into one NAFTA country for processing and then exporting the manufactured item to another NAFTA country. See *Merck* v. *United States*, 435 F. Supp. 2d 1253, 1259-1260 (Ct. Int'l Trade 2006), aff'd, 499 F.3d 1348 (Fed. Cir. 2007). Because, in light of NAFTA, petitioner's exported herbicide was not subject to import duties imposed by Canada, petitioner's imports were not "similarly situated," *Cornell*, 192 U.S. at 427, to imports used to manufacture goods for export to countries with which the United States does not have a similar trade agreement. The Export Clause does not require the United States to waive import duties on raw

materials used to manufacture goods for export that will pass duty-free into other NAFTA countries.

d. Petitioner urges (Pet. 22-23) that collection of import duties on its imported chemicals constitutes an impermissible tax on "services and activities closely related to the export process." The "service" that petitioner claims is being burdened is its "use of a duty deferral program." Pet. 23. The duty deferral program, as its name suggests, is a program that allows the payment of duties to be "deferr[ed]" and assessed later when it can be determined whether and to what extent those duties are subject to reduction or waiver. The ultimate assessment and collection of the deferred duty cannot plausibly be described as imposing "effectively a tax" on petitioner's use of that "service." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
JEANNE E. DAVIDSON
TODD M. HUGHES
BARBARA S. WILLIAMS
Attorneys

OCTOBER 2008

107

No. 08-31

Supreme Court, U.S.
FILED
OCT 17 2008
OFFICE OF THE CLERK

In The Supreme Court of the United States

NUFARM AMERICA'S INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF ON PETITION FOR WRIT OF CERTIORARI

Joel R. Junker
Counsel of Record
JOEL R. JUNKER & ASSOCIATES
1191 Second Avenue, Suite 1800
Seattle, Washington 98101
(206) 621-7878

Counsel for Petitioner

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTION PRESENTED

The Opposition Brief states the Question Presented incorrectly in the respect that there was no "failure to waive import duties" as a matter of law or in the facts of record and for the reason that the courts below have never seen or ruled on the issue of whether a "failure to waive import duties" violates the Export Clause. Petitioner submits that the statement of the Question Presented in the Petition correctly describes the constitutional issue before this Court:

> Whether the Export Clause in Article I, Section 9, Clause 5 of the United States Constitution is violated by assessment of duties on goods, pursuant to the North American Free Trade Agreement Article 303, the North American Free Trade Agreement Implementation Act and 19 C.F.R. § 181.53, because those goods have been exported to a NAFTA country after importation into a duty deferral program.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT 1

ARGUMENT 2

CONCLUSION 12

TABLE OF AUTHORITIES

PAGE(S)

Cases

A.G. Spalding & Bros. v. Edwards,
262 U.S. 66 (1923) 9

Cornell v. Coyne,
192 U.S. 418 (1904) 8

United States v. International Business Machine Corp.,
517 U.S. 843 (1996) 7

United States v. United States Shoe,
523 U.S. 360 (1998) 7

Public Law

NAFTA Art. 303(3), I.L.M. 4, 5, 10, 11

Regulations

19 C.F.R. § 10.31 4

19 C.F.R. § 10.39(d)(1) 5

19 C.F.R. § 181.53 ..... 1, 2

19 C.F.R. § 181.53(a)(2)(i)(A) 5

Harmonized Tariff Schedule of the United States

HTSUS U.S. General Note 1 .....3, 4

HTSUS Chapt. 98 Subchapt. XIII U.S. Note 1(a) 4

HTSUS 9813.00.05.....2, 3

In The
Supreme Court of the United States

NUFARM AMERICA'S, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO OPPOSITION BRIEF ON PETITION FOR WRIT OF CERTIORARI

STATEMENT

Petitioner takes exception to the Opposition Brief's Statement references to a "deferral" or "waiver" of "import duties", e.g. Opp. Br. pp. 2, 3, 4, 5, 6. As discussed in Petitioner's Argument *infra*, there is no basis in fact or law to claim that the duties exacted under 19 C.F.R. § 181.53 are import duties that have been deferred or waived. The goods entered into the United States in this case under an entry for Temporary Importation Under Bond were "exempt" from duty under the Harmonized Tariff Schedule of the United States. Consequently, the goods were not "subject to" import duties that could be "deferred" or "waived."

Similarly, the Opposition Brief incorrectly states that Petitioner "invoked HTSUS 9813.00.05 to defer payment" of duties "[i]nstead of paying those duties immediately." Opp. Br. p. 4. As detailed in Petitioner's Argument *infra*, under the Tariff Schedule and Customs regulations, imports entered under this classification are "exempt" from rather than "subject to" duties at time of import. Accordingly, Petitioner did not "invoke" HTSUS 9813.00.05 to "defer" payment of duties on goods that were "exempt" from duties.

ARGUMENT

Petitioner Nufarm America's, Inc. ("Nufarm") replies to the Opposition Brief of the United States with the following points:

1. The Opposition Briefs argument is based in the main on a mischaracterization of the legal exaction of duties pursuant to 19 C.F.R. § 181.53 ("the Regulation") as a "failure to waive import duties" imposed on imported goods which are "deferred" and which can be ultimately "waived" if the goods are used to manufacture articles that are then exported to another country that will apply its own import duties. Opp. Br. I, 4-5, 6.

The legal provisions under which exaction of the Regulation's duties occurs do not provide for "imposition" of import duty that is "deferred" followed by a "failure to waive the import duties" upon export to a NAFTA country. Stated precisely, the imported goods are "exempt" from duty under the terms of the Harmonized Tariff Schedule of the

United States ("HTSUS") and Customs duty deferral regulations, and thereafter no duties are ever laid on the goods with the single exception of when an "exported good" becomes "subject to duty" under the Regulation upon the goods export to Canada or Mexico. Because neither the imported goods nor the exported goods are "subject to" import duties, it cannot be said that duties laid on the exported goods resulted from a "failure to waive import duties."

HTSUS U.S. General Note 1 provides:

> 1. Tariff Treatment of Imported Goods and of Vessel Equipments, Parts and Repairs. All goods provided for in this schedule and imported into the customs territory of the United States from outside thereof, and all vessel equipment, parts, materials and repairs covered by the provisions of subchapter XVIII to chapter 98 of this schedule, are **subject to duty *or* exempt therefrom** as prescribed in general notes 3 through 29, inclusive.

(Emphases added.) The Customs regulation governing Temporary Importations under Bond ("TIBs"), i.e. the duty deferral program used by Nufarm for the entry of its imports under HTSUS 9813.00.05, refers to

> Entry of articles brought into the United States temporarily and **claimed to be exempt from duty**....

19 C.F.R. § 10.31 (emphasis added).

While the Opposition Brief repeatedly refers to import duties as being "imposed" and then "deferred" under a TIB, as a matter of law there is no provision for the "imposition" and "deferral" of duty on TIB entries in U.S. General Note 1, the TIB classification or the relevant Customs regulation. Instead, at time of importation, goods imported under a TIB are "exempt" from rather than "subject to" duties. It therefore cannot be said that import duties were "imposed" on these goods when entered, then "deferred" until export, and finally laid on the exported goods by virtue of a "failure to waive" the import duties because of export to Canada or Mexico.

As Nufarm's TIB imports were exempt from and not subject to import duties, the only applicable legal authority under which Nufarm's goods could become "subject to" duties is the authority contained in NAFTA Article 303 and the Regulation. If Nufarm's goods had been exported in a timely manner to any non-NAFTA country, no duty is owed on Nufarm's exports or imports because the imported goods exempt from duty under the TIB have met the requirements of the TIB for continued exemption from duties. HTSUS Chapt. 98 Subchapt. XIII U.S. Note 1(a). If Nufarm's goods had not been exported, import duties are not imposed under the HTSUS; instead "liquidated damages" are assessed under Customs regulations for breach of the

conditions of the importers bond in the amount of double the applicable estimated duties. 19 C.F.R. § 10.39(d)(1). When Nufarm's goods are entered under a TIB and are subsequently exported to Canada or Mexico, only then do they become "subject to" duties under authority of the Regulation which mandates that the "exported good shall be subject to duty." 19 C.F.R. § 181.53(a)(2)(i)(A). This treatment is consistent with Article 303 which does not require that import duties are actually applied, but rather that the Party to NAFTA "shall assess customs duties *as if* the exported good had been withdrawn for domestic consumption." NAFTA Art. 303(3), I.L.M. at 300; emphasis added.

In sum, the Opposition Brief is wholly inaccurate when it states that Nufarm paid "import duties related entirely to petitioner's importation of chemicals." Opp. Br. p. 10 The imported goods were "exempt" from duty and were never subject to any import duty that was deferred or subsequently laid on exported goods through a "failure to waive import duty." Duty was laid on the exported goods only under authority of the Regulation upon the condition of exportation out of a duty deferral program to Canada or Mexico. *See also* Brief of Amicus Curiae Transbas Inc., p.9 footnote 7.

2. The Opposition Brief's choice of the new nomenclature "failure to waive import duties" to characterize the exaction of duties under the Regulation does not overcome the fact that the Regulation's requirement to pay duties was mandated for the express function of restricting export trade of goods imported into a duty deferral

program for export and then subsequently exported to Canada or Mexico. Thus, the duties that purportedly result from a "failure to waive import duties" nevertheless burden intentionally and specifically goods exported from the United States.

It should be noted that the Opposition Brief does not specifically defend or rely on the holdings of the courts below that the duties at issue are constitutional because they are "imposed" upon importation and merely "assessed" under the Regulation upon the export of the merchandise. Indeed, the Government appears to desert this distinction when it refers in the first sentence of its argument to the Regulation which "imposes a duty upon imported goods." Opp. Br. 6.

Instead, the Government claims, for the first time in eight years of argument in administrative and judicial proceedings, that the duties paid by Nufarm are constitutional because they are the result of a "failure to waive" import duties. Instead of defending the affirmative act of "assessment" of duties on exported goods under the Regulation, the Government now seeks to rely on a distinction as to duties laid on exported goods by way of an omission through "failure to waive import duties."

Whether exaction of duties occurs by imposition, assessment, levy or any other affirmative laying of a duty upon goods, or by "failure to waive" or any other omission, the test in this Court's holdings on the Export Clause is still the same, that is whether a tax or duty has been laid on exported goods directly or indirectly in a manner that

operates or functions as a burden on exports. *United States v. International Business Machine Corp.*, 517 U.S. 843 (1996) ("*IBM*").

The Opposition Brief's argument that the Regulation's duties do not violate the Export Clause because they result from a "failure to waive import duties" ignores the holding of the Court that a tax or duty violates the Export Clause, even though not placed on the exports themselves, where such a charge is "functionally the same." *IBM*, 517 U.S. at 846. Similarly, the Court in *United States v. United States Shoe*, 523 U.S. 360, 367 (1998) ("*U.S. Shoe*") ruled that a charge which, regardless of its name, effectively operates as a tax or duty on exported goods violates the Export Clause. The Court observed that the "crucial question" is whether the charge is a duty on exports "in operation as well as nomenclature." *U.S. Shoe*, 523 U.S. at 367.

A "failure to waive import duties" that indirectly burdens an export is no less violative of the Export Clause than a duty on premiums for export shipment insurance which indirectly operate as a burden on exports. *IBM* at 854-55. Whether by affirmative act or omission, whether direct or indirect, a tax or duty violates the Export Clause where the effective result of its exaction is a burden on exports, a burden on services or activities closely related to the export process, the regulation of export trade or the raising of revenue from export trade. *IBM* at 854-56, 859.

In the long line of cases that establish the uniquely broad construction and application of the

Export Clause, there is no authority that remotely suggests the Export Clause should not apply to duties that burden exported goods simply because those duties arise indirectly through a "failure to waive" deferred import duties as a result of the export of those goods. An indirect burden through the purported "failure to waive" duties directed to certain goods because of their export operates and is functionally the same as a tax or duty laid on exported goods through direct imposition or assessment and should be prohibited under the broadly interpreted Export Clause.

3. The Opposition Brief's argument that the duties paid by Nufarm under the Regulation are exempt from the Export Clause under *Cornell v. Coyne*, 192 U.S. 418 (1904) as "prior ordinary burdens of taxation which rest upon all property similarly situated" (Opp. Br. p. 7-8) is contradicted by the fact that the payment of duties is mandated under the Regulation specifically, expressly and solely to the limited situation in which goods entered into a duty deferral program are exported out of the duty deferral program for export to Canada or Mexico.

Exaction of duty under the Regulation is not a remote general tax on all imported goods that incidentally falls on exports. The taxation in this case did not occur as a general tax on all similarly situated goods simply because they were imported, nor was the tax generally laid on all manufacture of goods in a duty deferral program. Those predicates did not result in the payment of duty by Nufarm. The limited situation that was the predicate to the

Regulation's application of duties in this matter was the entry of goods into a duty deferral program and their subsequent export specifically to Canada or Mexico. The Regulation's exaction of duties on exported goods was not incidental; it was expressly intended.

Thus, the Regulation's duties are not a "prior ordinary burden of taxation which rests upon all property similarly situated." It is a tax laid in a limited and discriminatory manner to burden specific exports solely because they involved entries into a duty deferral program and subsequent export to two specified countries. Rather than being exempt from the Export Clause, this tax is in clear violation of its proscription.

4. The Opposition Brief argues that under *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923) ("*Spalding*") the duty paid by Nufarm pursuant to the Regulation is exempt from the Export Clause because it is a tax only on the process of manufacturing goods for export and not on goods in the course of exportation. This argument is not supported by the holding of that case or the facts of record in this case.

Spalding held that even a tax imposed under a general law "not aimed specially at exports" violated the Export Clause when it was laid on a transaction that "from start to finish was understood and intended by the plaintiff...to be for the purpose of exporting the goods...The question is whether the [taxed event] was a step in exportation...." 262 U.S. at 68-69. The duty paid by Nufarm under the

Regulation's requirements was not exacted because the goods were imported or because manufacturing occurred. Duty payment was mandated under the Regulation ultimately because of the fact that these imported goods were entered under a TIB for manufacture and mandatory export, and then were subsequently exported to Canada or Mexico.

5. With respect to Nufarm's argument that the Regulation's duties are an impermissible tax on "services and activities closely related to the export process," the Opposition Brief first responds by mischaracterizing Nufarm's payment of duties under the Regulation as the "collection of import duties on its imported chemical." Opp. Br. p. 12. What the Opposition Brief fails to note is that Nufarm did not pay any "import duties" on its imported chemicals under the requirement of the Tariff Schedule, but rather by virtue of the authority of NAFTA Article 303 and the Regulation. The Regulation, moreover, did not require Nufarm to pay import duties on its imported chemicals. The Regulation required that "the exported goods shall be subject to duty" after their export out of a duty deferral program to Canada or Mexico, and that the duty to which the exported good shall be subject is "assessed" on the basis of the "condition" of the imported good, i.e. its condition, weight and value, "at the time of its importation."

There is an obvious problem with the Opposition Brief's conclusion that "the ultimate assessment and collection of the deferred duty cannot plausibly be described as imposing 'effectively a tax'" on Nufarm's use of a deferral program as a

service and activities closely related to the export process. When Congress required the application of duties under NAFTA Article 303 and the enabled Regulation, it did so with the express intent to "restrict" the use of duty deferral programs for exporting goods to other NAFTA countries. It is entirely accurate to describe the Regulation's duties as a tax to limit the use of duty deferral programs for exporting goods to Canada or Mexico because that is expressly what Congress intended.

While Congress has power under Article I of the Constitution to regulate foreign commerce, the broadly interpreted Export Clause strictly prohibits Congress from exercising that power to regulate through laying taxes or duties on exported goods or on "services and activities closely related to the export process."

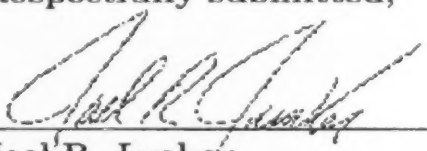
Finally, the Opposition Brief contradicts itself when it argues on the one hand that the duties are a tax on the process of manufacturing for export in a duty deferral program, rather than a duty laid on goods in the export process (Opp. Br. p. 9), and then argues that the duties are not a tax on the use of duty deferral programs for manufacture for purposes of export. If the Government asserts that the Regulation's duties are a tax on manufacture because it occurs under a duty deferral program for mandatory export of the manufactured goods, then it is a tax on services and activities closely related to the export process. In the end, Congress and the Regulation intend that exported goods are subject to a duty laid on goods to restrict their being entered into a duty deferral program and then subsequently

exported to Canada or Mexico. It is a duty which by its operation is functionally laid upon and burdens both exports and the use of duty deferral programs created as a service and activity for facilitation of export trade.

CONCLUSION

Based on the foregoing argument and the absence of any argument in the Opposition Brief that the issues raised are not of significant economic and public importance, Petitioner respectfully submits that the petition for certiorari should be granted.

Respectfully submitted,



Joel R. Junker
Counsel of Record
JOEL R. JUNKER & ASSOCIATES
1191 Second Ave., Ste. 1800
Seattle, WA 98101
(206) 621-7878

104

2

No. 08-31

FILED
AUG 7 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

NUFARM AMERICA'S INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* TRANSBAS, INC. IN SUPPORT OF PETITIONER

Michael G. Hodes
Counsel of Record
HODES KEATING & PILON
134 North LaSalle Street, Suite 1300
Chicago, Illinois 60602
(312) 553-1440

Counsel for Amicus Curiae

August 7, 2008

THE LEX GROUP^{DC} • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTION PRESENTED

Whether the Export Clause in Article I, Section 9, Clause 5 of the United States Constitution is violated by assessment of duties on goods, pursuant to the North American Free Trade Agreement Article 303, the North American Free Trade Agreement Implementation Act and 19 C.F.R. § 181.53, because those goods have been exported to a NAFTA country after importation into a duty deferral program.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

REASONS FOR GRANTING THE PETITION 4

I. This Court Should Review And Reverse The Federal Circuit's Unprecedented Restrictive Application Of The Export Clause 4

A. By Failing To Provide The Unqualified Protection Of The Export Clause Intended By The Drafters And Recognized By This Court, The Federal Circuit's Decision Contradicts Established Precedent 4

B. A Broad Interpretation Of The Export Clause Requires An Inquiry Into Whether Goods Entered Into A Duty Deferral Program Are "Articles Exported." 8

II. The Unconstitutional Duties Assessed Under The Regulations Have A Negative Economic And Commercial Impact On The Substantial U.S. Export Trade To Canada And Mexico 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

A. G. Spalding & Bros. v. Edwards,
262 U.S. 66 (1923) 10

Almy v. California,
65 U.S. 169 (1861) 5, 6

Fairbank v. United States,
181 U.S. 283 (1901) 6

Nufarm America's, Inc. v. United States,
521 F.3d 1366 (Fed. Cir. 2008) 7

United States v. International Business Machines Corp.,
517 U.S. 843 (1996) 5, 10

United States v. United States Shoe Corp.,
523 U.S. 360 (1998) 4, 5, 9

CONSTITUTIONAL PROVISION

U.S. CONST. art. I § 9, cl. 5 ..... i, 4

STATUTE

19 U.S.C. § 1202 9

REGULATIONS

19 C.F.R. § 10.39(d)(1) 9

19 C.F.R. § 181.53 i

19 C.F.R. § 181.53(a)(2) 9

OTHER AUTHORITIES

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., Yale University Press 1937) (1787) 5

ERIK M. JENSEN, THE TAXING POWER: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION (2005) 5

NAFTA art. 303 i

NAFTA Implementation Act, Pub. L. No. 103-182 i

INTEREST OF *AMICUS CURIAE*[1]

Transbas, Inc. is a manufacturer with its principal place of business near Billings, Montana, situated approximately 250 miles south of the United States-Canada border. Its facility occupies approximately twenty-seven acres outside of the city limits of Billings. Transbas employs approximately thirty-five employees. Transbas engages in the manufacture and formulation of herbicide for broadleaf weeds. It is one of only four manufacturing facilities in the United States capable of manufacturing and formulating herbicide for both early season/late season (cool weather) and mid-season (warm weather) application.

Because of its location, Transbas is ideally situated to serve the agricultural needs of the Western United States as well as the vast agricultural interests of Western Canada. Transbas regularly imports products into the United States and in the past, it has availed itself of the duty deferral program which is the subject of this controversy. It formulates product and resells it both domestically and to customers in Canada. Due to a close proximity to the Canadian border, Transbas

---

[1] Counsel for both Petitioner and the United States received notice of intent to file this brief on July 28 and July 29, 2008, respectively. Counsel for Petitioner and the United States both consented to the filing of this brief on August 1, 2008. No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel, made a monetary contribution to its preparation or submission.

experiences relatively lower costs than exporters more remotely located. A burden imposed on the export trade of the United States to Canada, whether *de jure* or *de facto*, affects Transbas' interests.

Transbas has two distinct interests which support a request for this Court to grant *certiorari*.

Transbas is currently a plaintiff in a case pending in the United States Court of International Trade, *Transbas, Inc. v. United States*, Court No. 04-00163, involving the identical issue as Petitioner raises herein. The final outcome of this case will guide the disposition of Transbas' case.

Although Transbas clearly seeks to protect a private economic interest, it also stands as an exemplar of a broader public constituency, namely those United States manufacturers, importers and exporters situated in close proximity to the borders of Canada and Mexico. These manufacturers, importers and exporters are specially affected by the statutory and regulatory scheme which imposes import duties upon the exportation of their goods to Canada or Mexico but not to any non-NAFTA country. The importation of product or material for domestic consumption subject to ordinary duties imposes no burden of Constitutional dimension on parties such as Transbas. owever, when material is imported initially exempt from duty because of its required export, and a duty is imposed thereafter upon exportation to Canada and Mexico, but not to other countries, such a circumstance impacts the scope of commercial activity of the affected parties. For example, Transbas believes that since this

statutory scheme was implemented, it has lost at least two customers because of the duty burden, one of whom simply began sourcing the formulated product off-shore.

SUMMARY OF THE ARGUMENT

The Court should grant *certiorari* because the Federal Circuit's decision resulted in an unprecedented restrictive application of the Export Clause. The drafters intended the Export Clause to provide unqualified protection from taxation for goods in export transit, particularly if such burdens resulted in regional discrimination. This Court's precedent mandates a broad interpretation of the Export Clause. This broad interpretation requires an inquiry into whether goods entered into a duty deferral program are "Articles exported." The importance of correcting the Federal Circuit's narrow restrictive interpretation is demonstrated by the negative effect of the unconstitutional duties on the substantial export trade from the United States to Canada and Mexico, its two largest export markets.

REASONS FOR GRANTING THE PETITION

I. This Court Should Review and Reverse the Federal Circuit's Unprecedented Restrictive Application of the Export Clause.

A. By Failing to Provide the Unqualified Protection of the Export Clause Intended By The Drafters and Recognized By This Court, The Federal Circuit's Decision Contradicts Established Precedent.

The history of the Export Clause, Article I, Section 9, Clause 5 of the United States Constitution and the jurisprudence of this Court require a broad construction of the Export Clause.

This Court has consistently held that the Export Clause is unparalleled with respect to other Constitutional limitations on Congress' taxing power, as the Export Clause is a "simple, direct, unqualified prohibition on any taxes or duties . . . ." *United States v. United States Shoe Corp.*, 523 U.S. 360, 368 (1998). The history of the Clause is firmly rooted in fears of discrimination against certain States: "The Framers sought to alleviate . . . concerns [that Northern States would tax exports to the disadvantage of Southern States] by completely denying to Congress the power to tax exports at all."

Id. (quoting *United States v. International Business Machines Corp., (IBM)*, 517 U.S. 843, 861 (1996)). Many delegates "worried about export taxation's potential for destroying the union through targeted duties."[2] Delegate Elbridge Gerry of Massachusetts expressed his concerns that "the legislature could not be trusted with such a power," which "might be exercised partially, raising one and depressing another part of [the Country]."[3]

Attempts to weaken the Export Clause were rebuffed.[4] One unsuccessful attempt would have permitted export taxation only for the regulation of trade, prohibiting taxation that was meant solely to raise revenue.[5] Another amendment which would have allowed the government to tax exportations "in extraordinary circumstances" was also rejected.[6] The resultant Export Clause is, and remains, an inflexible blanket prohibition on all export taxes.

An Export Clause analysis must be wide, demanding scrutiny of anything which operates as a duty on exports. In 1861, in *Almy v. California* this Court held that a California state stamp tax upon

---

[2]ERIK M. JENSEN, THE TAXING POWER: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 31 (2005).

[3]*Id.* (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 350 (Max Farrand ed., Yale University Press 1937) (1787)).

[4]*Id.* at 34.

[5]*Id.*

[6]*Id.* at 35.

bills of lading for export from the state was "repugnant" to the Export Clause. *Almy v. Cal.*, 65 U.S. 169, 175 (1861). The Court broadly construed the Export Clause, requiring a thorough examination of the factual circumstances surrounding the tax. The *Almy* Court stated that "a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading . . . is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another." *Id.* at 174.

Later, in *Fairbank v. United States*, 181 U.S. 283, 291 (1901), this Court echoed the concerns of the Framers, noting that "[t]he power to tax is the power to destroy." The *Fairbank* Court, invalidating a stamp tax on foreign bills of lading, broadly construed the Export Clause as a "restriction on the power of Congress" which "should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which . . . destroys the spirit and purpose of the restriction imposed." *Id.* at 290. This deference to the "spirit" and "purpose" of the Export Clause requires in no uncertain terms a broad examination of any direct and indirect effects on exported goods. In the words of this Court, "what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result." *Id.* at 294.

By failing to apply the unqualified protection of the Export Clause, the Federal Circuit's decision permits the very type of regional discrimination the

Export Clause was originally intended to prevent. The statutory and regulatory scheme offends the very purpose of the Export Clause as conceived by the drafters, by failing to protect particular states or regions from discriminatory burdens upon their export commerce. The application of the deferred duties, triggered only upon exportation of goods to Canada or Mexico, has a particularly harmful effect since it impacts disproportionately those businesses situated along the borders of Canada and Mexico by reducing their competitive advantage arising out of their proximity to the border.

The Federal Circuit's determination that the tax is imposed on imported goods but assessed later upon exportation, without considering whether it is also imposed on goods in export transit, cannot pass Constitutional muster. A broader inquiry, necessitated by this Court's broad interpretation of the Export Clause, is required in this instance. Once the Federal Circuit determined the duty was "imposed" upon entry of the goods into the duty-deferral program and was thereafter merely "assessed" at the time of exportation, *Nufarm America's, Inc. v. United States*, 521 F.3d 1366, 1369 (Fed. Cir. 2008), it ceased further analysis. It should have examined whether the exaction was nonetheless a burden on exportation because the goods themselves were in some stage of export

transit. Because the Export Clause requires a broad interpretation, based upon the legislative history of the Export Clause and this Court's precedent, the Federal Circuit failed to engage in a more rigorous analysis to ascertain whether the exaction nonetheless constituted a duty on "Articles exported."

B. A Broad Interpretation Of The Export Clause Requires An Inquiry Into Whether Goods Entered Into A Duty Deferral Program Are "Articles Exported."

Amicus is in full agreement with Petitioner that the Federal Circuit decision narrowed significantly this Court's interpretation of the Export Clause. Under the particular statutory and regulatory scheme involved in this case, and as alluded to by Petitioner (Pet. 15-16.), Petitioner's goods, from the very instant they entered the duty deferral program, were branded as goods destined

for exportation *somewhere*.[7] They could not lawfully remain in the United States beyond the period specified in the tariff. U.S. Note 1(a), Chapter 98 Subchapter XIII, Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202 (2008 ed.). Petitioner frames this issue in terms of whether the duties, even if an import tax, were nevertheless a tax on goods in export transit or functionally the same as a tax on exports. (Pet. 9.)

This Court has broadly exempted from federal taxation both export goods and services and activities closely related to the export process. At

---

[7] The characterization of the scheme as a *duty* deferral program should not necessarily guide the result. As this Court noted in *United States Shoe Corp.* (with reference to the inquiry of whether the Harbor Maintenance Tax is a "tax" or a "fee"), " the crucial question is whether the HMT is a tax on exports in operation as well as nomenclature . . . ." 523 U.S. at 367. It is true that if the goods in question were entered for ordinary consumption, a duty would have been lawfully imposed and assessed. However, once the goods were entered into the duty deferral program, both their relationship to an "export transaction" and the character of the liability, changed. Had the goods remained in the United States in violation of the terms of the duty deferral program, the importer would have been responsible to only pay contractual liquidated damages under its import bond, not duty. 19 C.F.R. § 10.39(d)(1) (2008). According to the statute, an importer is only required to pay duties *qua* duties for waste which remains in the U.S. U.S. Note 2(b)(ii), Chapter 98 Subchapter XIII, HTSUS. Imported goods are either subject to duty or exempt. General Note 1, HTSUS. In this case, from the time the goods were entered into the duty deferral program, they were no longer subject to duty if exported to any destination in the world except Canada and Mexico and then, only upon the act of exportation to either of these destinations. 19 C.F.R. § 181.53(a)(2) (2008).

the same time, it has sought to limit the term "Articles exported" in order to permit the imposition of taxes on pre-export goods and services. *IBM*, 517 U.S. at 846. In light of the circumstances of this case, the Federal Circuit was required to engage in an analysis of the type suggested in *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923). As Justice Holmes noted in *Spalding*, "[W]e have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin." *Id.* at 69.

In this case, given that the goods were temporarily brought into the United States for the express purpose of performing some operation prior to a required exportation, it was incumbent upon the Federal Circuit to engage in a *Spalding* analysis in order to determine whether the entry into the duty deferral program was in fact the beginning of the export process or so closely associated with the lawfully required act of exportation that, in Petitioner's words, the duties, even if an import tax, were nonetheless a tax or burden on export goods. Having concluded the exaction was a deferred import duty, the Federal Circuit assumed it could not be a tax or duty on "Articles exported" under the Export Clause. A *Spalding*-type inquiry, essentially examining when the goods first entered the stream of export commerce for purposes of the exaction, would have produced a different result.

II. The Unconstitutional Duties Assessed Under The Regulations Have A Negative Economic And Commercial Impact On The Substantial U.S. Export Trade To Canada And Mexico.

Petitioner notes that the regulation of duty in this case was expressly intended to restrict trade with Canada and Mexico. (Pet. 3.) This unconstitutional regulation of export trade has a substantial commercial and economic impact on the two biggest United States export markets. The constitutional issue presented in this case is real and is ripe for adjudication.

Both Petitioner and *amicus*, as well as similarly situated importers, exporters and manufacturers, have a strong economic interest in the final decision, in terms of the substantial exactions already paid and the effects the final decision will have on their future business decisions.

On a broader level, the national importance of the issue pending for *certiorari* is illustrated by the staggering amount of goods and services which pass though United States borders for export to Mexico and Canada. An unknown, but surely significant, amount of these goods are produced, or could be produced, from foreign materials imported through a duty deferral program such as the one at issue here.

The negative implications of the Federal Circuit decision cut a wide swath across geographic regions and industries. Most seriously affected are the border states and the manufacturers, exporters, importers, distributors, suppliers, etc. who depend

upon exports to their northern and southern neighbors for much of their economic lifeblood and whose physical proximity to the border gives them a competitive edge which is eroded by any burden on the exportation of their goods.

In 2007, the United States exported more goods to Canada and Mexico than to any other nations, ranking first and second respectively in total exports.[8] The U.S. exported $248.9 billion in goods to Canada in 2007, 21.4% of all goods exported from the U.S.[9] The U.S. exported $136.5 billion in goods to Mexico, comprising 11.7% of total exports.[10] In sum, 33.1% - one third - of the value of the United States' export trade in goods went to Canada and Mexico. To gain perspective on these figures, China, the number three destination, received U.S. exported goods worth $65.2 billion - 5.6% of total U.S. exports.[11]

Perhaps even more telling is the level of export trade in 2007 by the individual states with Canada and Mexico. Among the fifty states, Canada

---

[8] U.S. Census Bureau Website, Foreign Trade Statistics, "Top Trading Partners - Total Trade, Exports, Imports: Year-to-Date December 2007," *available at* http://www.census.gov/foreign-trade/statistics/highlights/top/top0712.html (last visited Aug. 4, 2008).

[9] *Id.*

[10] *Id.*

[11] *Id.*

is the leading export market for thirty-six states.[12] Canada or Mexico is the leading export destination for eleven of the fifteen border states (whose land masses touch foreign soil).[13] For eight of the fifteen border states, exports to Canada or Mexico represented 25% or more of the states' total exports.[14]

The Court's decision to grant *certiorari* is of critical importance for the businesses whose economic well-being is tied to a flourishing export trade with Canada and Mexico.

---

[12]U.S. Department of State Website, Bureau of Western Hemisphere Affairs, "Background Note: Canada," http://www.state.gov/r/pa/ei/bgn/ (last visited Aug. 4, 2008).

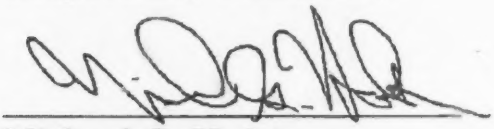
[13]U.S. Census Bureau Website, Foreign Trade Statistics, "State by 6-Digit HS Code and Top Countries: State by Top 25 Commodities and Countries: 2004 - 2007," *available at* http://www.census.gov/foreign-trade/statistics/state/data/index.html (last visited Aug. 4, 2008). Canada shares a land border with eleven states, from west to east: Alaska, Washington, Idaho, Montana, North Dakota, Minnesota, Michigan, New York, Vermont, New Hampshire and Maine. Mexico shares a land border with four states, from west to east: California, Arizona, New Mexico and Texas.

[14]*Id.*

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, *certiorari* should be granted.

Respectfully submitted,



Michael G. Hodes
Counsel of Record
Hodes Keating & Pilon
134 N. LaSalle St., Suite 1300
Chicago, IL 60602-1007
(312) 553-1440

Counsel for *Amicus Curiae*